DOCKET

No. 13-1034

Title:	Moones Mellouli, Petitioner
	v.
	Loretta E. Lynch, Attorney General
Docketed:	February 28, 2014
Linked with 13A746	
Lower Ct:	United States Court of Appeals for the Eighth Circuit
Case Nos.:	(12-3093)
Decision Date:	July 9, 2013
Rehearing Denied:	October 28, 2013

Questions Presented

—Date—	——Proceedings and Orders——
Jan 14 2014	Application (13A746) to extend the time to file a petition for a writ of certiorari from January 26, 2014 to February 26, 2014, submitted to Justice Alito.
Jan 17 2014	Application (13A746) granted by Justice Alito extending the time to file until February 25, 2014.
Feb 25 2014	Petition for a writ of certiorari filed. (Response due March 31, 2014)
Mar 26 2014	Order extending time to file response to petition to and including April 30, 2014.
Apr 29 2014	Order further extending time to file response to petition to and including May 14, 2014.
May 14 2014	Brief of respondent Eric H. Holder, Jr., Attorney General in opposition filed.
May 29 2014	Reply of petitioner Moones Mellouli filed.
Jun 3 2014	DISTRIBUTED for Conference of June 19, 2014.
Jun 23 2014	DISTRIBUTED for Conference of June 26, 2014.
Jun 30 2014	Petition GRANTED.
Aug 5 2014	The time to file the joint appendix and petitioner's brief on the merits is extended to and including September 17, 2014.
Aug 5 2014	The time to file respondent's brief on the merits is extended to and including November 20, 2014.
Sep 12 2014	Proposal from counsel for the petitioner to lodge a one-page report from the Kansas Sentencing Commission of September 3, 2014.
Sep 15 2014	Consent to the filing of amicus curiae briefs in support of either party or neither party received from counsel for the petitioner.
Sep 17 2014	Joint appendix filed. (Statement of costs filed.)
Sep 17 2014	Brief of petitioner Moones Mellouli filed.
Sep 24 2014	Brief amicus curiae of Immigration Law Professors filed.

Sep 24 2014	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
Sep 24 2014	Brief amici curiae of National Immigrant Justice Center, et al. filed.
Nov 20 2014	Brief of respondent Eric H. Holder, Jr., Attorney General filed.
Nov 21 2014	SET FOR ARGUMENT ON Wednesday, January 14, 2015
Dec 2 2014	CIRCULATED.
Dec 2 2014	Record request from U.S.C.A. 8th Circuit.
Dec 17 2014	Record receive from U.S.C.A. 8th Circuit. (1 Envelope)
Dec 22 2014	Reply of petitioner Moones Mellouli filed. (Distributed).
Jan 14 2015	Argued. For petitioner: Jon Laramore, Indianapolis, Ind. For respondent: Rachel P. Kovner, Assistant to the Solicitor General, Department of Justice, Washington, D. C.
Jun 1 2015	Judgment REVERSED. Ginsburg, J., delivered the opinion of the Court, in which Roberts, C. J., and Scalia, Kennedy, Breyer, Sotomayor, and Kagan, JJ., joined. Thomas, J., filed a dissenting opinion, in which Alito, J., joined.

PETITION FOR WRIT OF CERTIORARI

RECORD AND BRIEFS

No. 13-1034

Supreme Court, U.S.
FILED
FEB 25 2014
OFFICE OF THE CLERK

In the Supreme Court of the United States

MOONES MELLOULI,
Petitioner,

v.

ERIC H. HOLDER, JR., Attorney General,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 8 U.S.C. § 1227(a)(2)(B)(i), a noncitizen may be removed if he has been convicted of violating "any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21) " Regarding removal based on a state conviction for possessing drug paraphernalia, the circuits are split on whether the paraphernalia must be related to a substance listed in Section 802 of Title 21, the Controlled Substances Act.

To trigger deportability under 8 U.S.C. § 1227(a)(2)(B)(i), must the government prove the connection between a drug paraphernalia conviction and a substance listed in section 802 of the Controlled Substances Act?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

I. Statutory Background 2

II. Factual and Procedural History 4

REASONS FOR GRANTING THE PETITION 7

I. This decision and the Ninth Circuit's decision conflict irreconcilably with decisions of the Third and Seventh Circuits on an important and recurring issue of immigration law. 7

A. The Third and Seventh Circuits read the text of Section 802 to require a paraphernalia conviction to be related to a substance listed on a federal schedule. 9

B. The Eighth and Ninth Circuits' approach to paraphernalia convictions, like that of the Board of Immigration Appeals, conflicts irreconcilably with the Third and Seventh Circuits. 14

II. The Eighth Circuit's decision is incorrect for reasons in addition to those set forth by the Third and Seventh Circuits. 18

A. The evolution of the statutory language supports the approach of the Third and Seventh Circuits. 18

B. Kansas's law exemplifies the problem arising when federal courts apply a different standard to paraphernalia convictions than to possession convictions. 20

III. This case presents an appropriate opportunity for the Court to address this issue. 22

CONCLUSION 25

APPENDIX

Appendix A Opinion/Judgment, United States Court of Appeals for the Eighth Circuit (July 9, 2013) App. 1

Appendix B Decision of the Board of Immigration Appeals, United States Department of Justice, Executive Office for Immigration Review (August 7, 2012) App. 17

Appendix C Order of the Immigration Judge, United States Department of Justice, Executive Office for Immigration Review, Immigration Court (May 8, 2012) App. 20

Appendix D Written Decision of the Immigration Judge, United States Department of Justice, Executive Office for Immigration Review, Immigration Court (May 1, 2012) App. 23

Appendix E Written Decision of the Immigration Judge, United States Department of Justice, Executive Office for Immigration Review, Immigration Court (March 27, 2012) . App. 29

Appendix F Order, United States Court of Appeals for the Eighth Circuit (October 28, 2013) App. 36

Appendix G Statutes App. 38
8 U.S.C. § 1227 . App. 38
21 U.S.C. § 802 App. 39
Kan. Stat. Ann. § 21-5701 App. 39
Kan. Stat. Ann. § 21-5709 App. 39

TABLE OF AUTHORITIES

CASES

Alvarez Acosta v. U.S. Att'y Gen.,
524 F.3d 1191 (11th Cir. 2008) 17

Bermudez v. Holder,
586 F.3d 1167 (9th Cir. 2009) 15

Cardozo-Arias v. Holder,
495 Fed. App'x 790 (9th Cir. 2012) 13

Castillo v. Holder,
539 Fed. App'x 243 (4th Cir. 2013). 17

Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc.,
467 U.S. 837 (1984) 16, 17

Desai v. Mukasey,
520 F.3d 762 (7th Cir. 2008) 12, 13

Descamps v. United States,
133 S. Ct. 2276 (2013) 17, 23

Estrada v. Holder,
560 F.3d 1039 (9th Cir. 2009) 15

Gonzales v. Thomas,
547 U.S. 183 (2006) 25

Lopez v. Gonzalez,
417 F.3d 934 (8th Cir. 2005) 24

Lopez v. Gonzalez,
549 U.S. 47 (2006) 19, 24

Luu-Le v. INS.,
224 F.3d 911 (9th Cir. 2000) 14, 15

Madrigal-Barcenas v. Holder,
507 Fed. App'x 716 (9th Cir. 2013), *pet. for reh'g denied* (July 29, 2013), *cert. pet. filed* (Dec. 6, 2013, No. 13-697) 2, 8, 22

Matter of Davey,
26 I. & N. Dec. 37 (B.I.A. 2012) 8

Matter of Martinez Espinoza,
25 I. & N. Dec. 118 (B.I.A. 2009) 5, 8, 15, 16

Matter of Paulus,
11 I. & N. Dec. 274 (B.I.A. 1965) 8, 13, 16

Moncrieffe v. Holder,
133 S. Ct. 1678 (2013) 23

Nijhawan v. Holder,
557 U.S. 29, 42 (2009) 23

United States v. Oseguera-Madrigal,
700 F.3d 1196 (9th Cir. 2012) 14

Rojas v. Att'y Gen.,
728 F.3d 203 (3d Cir. 2013) *passim*

Ruiz-Vidal v. Gonzales,
473 F.3d 1072 (9th Cir. 2007) 13, 15

State v. Campbell,
106 P.3d 1129 (Kan. 2005) 21

State v. Schoonover,
133 P.3d 48 (Kan. 2006) 21

State v. Snellings,
273 P.3d 739 (Kan. 2012) 21

STATUTES

8 U.S.C. § 1101(a)(43)(B)	24
8 U.S.C. § 1182(a)(2)(A)(i)(II)	8
8 U.S.C. § 1182(a)(2)(C)(i)	20
8 U.S.C. § 1227	1, 4
8 U.S.C. § 1227(a)(2)(B)(i)	*passim*
8 U.S.C. § 1229a(c)(3)(A)	4
8 U.S.C. § 1251(a)(11)	8, 19
8 U.S.C. § 1252(a)(2)(D)	1
18 U.S.C. § 924(c)(2)	24
21 U.S.C. § 802	*passim*
21 U.S.C. § 802(6)	2, 21
21 U.S.C. § 802(34)(C)	21
21 U.S.C. § 802(34)(K)	21
21 U.S.C. § 812	3, 14
21 U.S.C. § 812(a)	2
21 U.S.C. § 812(b)	2
28 U.S.C. § 1254(1)	1
Kan. Stat. Ann. § 21-36a09	5
Kan. Stat. Ann. § 21-5701	1
Kan. Stat. Ann. § 21-5701(a)	3
Kan. Stat. Ann. § 21-5701(f)	3

Kan. Stat. Ann. § 21-5709 2

Kan. Stat. Ann. § 21-5709(b)(2) 3, 5, 23

Kan. Stat. Ann. § 65-4105(d)(30) 3

Kan. Stat. Ann. § 65-4105(d)(31) 3

Kan. Stat. Ann. § 65-4105(d)(33) 3

Kan. Stat. Ann. § 65-4105(d)(34) 3

Kan. Stat. Ann. § 65-4105(d)(36) 3

Kan. Stat. Ann. § 65-4109(f)(12) 3

Kan. Stat. Ann. § 65-4109(f)(14) 3

Kan. Stat. Ann. § 65-4109(f)(23) 3

Kan. Stat. Ann. § 65-4111(g) 4

Kan. Stat. Ann. § 65-4113 21

Kan. Stat. Ann. § 65-4113(d)(1) 4

Kan. Stat. Ann. § 65-4113(e) 4

Kan. Stat. Ann. § 65-4113(f) 4

Kan. Stat. Ann. § 65-4152(a)(3) (repealed by L. 2009, ch. 32, § 64) 21

Kan. Stat. Ann. § 65-7006 (repealed by L. 2009, ch. 32, § 64) 21

Pub. L. 99-570, § 1751, 100 Stat. 3207 (Oct. 27, 1986) 19

Pub. L. 104-208, § 108, 110 Stat. 3009 (Sept. 30, 1996) 19

REGULATIONS

21 C.F.R. §§ 1308.11-1308.15 2

21 C.F.R. § 1308.12(d)(1) 4

OTHER

National Institutes of Health, U.S. National Library of Medicine, Daily Med, Advil Cold and Sinus Drug Facts, *available at* http://dailymed.nlm.nih.gov/dailymed/lookup.cfm?setid=0da9ed22-bfb4-d61b-110b-0c7760332a98 21

National Institute of Health's National Center for Complementary and Alternative Medicines, Ephedra Fact Sheet, *available at* http://nccam.nih.gov/health/ephedra 21

John F. Simanski & Lesley M. Sapp, *Immigration Enforcement Actions: 2012* (Dec. 2013), *available at* https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2012_0.pdf (last visited Feb. 24, 2014) 8

PETITION FOR A WRIT OF CERTIORARI

Petitioner Moones Mellouli petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eighth Circuit (Pet. App. 1-14) is reported at 719 F.3d 995. The administrative decisions of the Immigration Judge (Pet. App. 23-28, 29-35) and the Board of Immigration Appeals (Pet. App. 17-19) are unreported.

JURISDICTION

The Eighth Circuit had jurisdiction under 8 U.S.C. § 1252(a)(2)(D) (providing judicial review for questions of law). The Eighth Circuit issued its decision on July 9, 2013. Pet. App. 1. On October 28, 2013, the Eighth Circuit denied by a 7-4 vote Petitioner's timely petition for panel rehearing or rehearing *en banc*. Pet. App. 36-37. On January 17, 2014, Justice Alito extended the time to file a petition for a writ of certiorari to and including February 25, 2014. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant portions of the Immigration and Nationality Act, 8 U.S.C. § 1227, are reproduced at Pet. App. 38. The relevant portion of the Controlled Substances Act, 21 U.S.C. § 802, are reproduced at Pet. App. 39. The relevant portions of Kansas law, Kan.

Stat. Ann. §§ 21-5701, 21-5709, are reproduced at Pet. App. 39-41.

STATEMENT OF THE CASE

This petition presents the same question as *Madrigal-Barcenas v. Holder*, 507 Fed. App'x 716 (9th Cir. 2013), *pet. for reh'g denied* (July 29, 2013), *cert. pet. filed* (Dec. 6, 2013, No. 13-697), in which the government's response is currently due March 12, 2014.

I. Statutory Background

The Immigration and Nationality Act renders deportable a noncitizen who has been admitted to the United States if after admission the noncitizen:

> has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana

8 U.S.C. § 1227(a)(2)(B)(i). Title 21 in turn defines "controlled substance" as "a drug or other substance, or immediate precursor, included in" one of the Controlled Substance Act's five schedules of controlled substances. 21 U.S.C. § 802(6); 21 C.F.R. §§ 1308.11-1308.15. The schedules are updated and republished annually. 21 U.S.C. § 812(a). Substances are placed on a particular schedule based on potential for abuse and the degree to which accepted medical uses exist. 21 U.S.C. § 812(b).

Kansas's Criminal Code makes it "unlawful for any person to use or possess with intent to use any drug paraphernalia to store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body." Kan. Stat. Ann. § 21-5709(b)(2). Kansas law in turn defines "drug paraphernalia" as "all equipment and materials of any kind which are used, or primarily intended or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body a controlled substance .... " Kan. Stat. Ann. § 21-5701(f). "Controlled substance" is defined as "any drug, substance or immediate precursor included in any of the schedules designated in" five separate Kansas statutory provisions. Kan. Stat. Ann. § 21-5701(a). Not all of the controlled substances identified in the Kansas schedules are included in the federal schedules at 21 U.S.C. § 812.[1]

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[1] There are currently approximately twenty-one substances listed on the Kansas schedules that do not appear on the federal schedules. At the time of Mellouli's offense, the Kansas schedules contained twelve substances that did not appear on the federal schedules, including salvia divinorum or salvinorum A (Kan. Stat. Ann. § 65-4105(d)(30)); datura stramonium, commonly known as gypsum weed or jimson weed (Kan. Stat. Ann. § 65-4105(d)(31)); 1–Pentyl–3–(1–naphthoyl)indole (Kan. Stat. Ann. § 65-4105(d)(33)); 1–Butyl–3–(1–naphthoyl)indole (Kan. Stat. Ann. § 65-4105(d)(34)); 1–(3–[trifluoromethylphenyl]) piperazine (Kan. Stat. Ann. § 65-4105(d)(36)); Methandranone (Kan. Stat. Ann. § 65-4109(f)(12)); Methandrostenolone (Kan. Stat. Ann. § 65-4109(f)(14)); Stanolone (Kan. Stat. Ann. § 65-4109(f)(23)); butyl

The government must establish the basis for removability under 8 U.S.C. § 1227 by clear and convincing evidence. 8 U.S.C. § 1229a(c)(3)(A). "No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence." *Id.*

II. Factual and Procedural History

1. Petitioner Moones Mellouli entered the United States in 2004 on a student visa and later was granted lawful permanent resident status. C.A. Admin. Rec. 290. He graduated magna cum laude from Drury University in 2006 and received two master's degrees (applied mathematics and economics) in 2009 from the University of Missouri-Columbia. C.A. Admin. Rec. 224-26. Mellouli taught mathematics at the University of Missouri-Columbia for three years before starting a career as an actuary. C.A. Admin. Rec. 183. In April 2010, Mellouli was detained for driving under the influence and later charged with the Kansas state felony offense of "trafficking in contraband in a jail." C.A. Admin. Rec. 150. These charging documents referenced four tablets of Adderall.[2] *Id.* The charge

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nitrite and its salts, isomers, esters, ethers or their salts (Kan. Stat. Ann. § 65-4111(g)); Propylhexedrine (Kan. Stat. Ann. § 65-4113(d)(1)); any compound, mixture or preparation containing any detectable quantity of ephedrine, its salts or optical isomers, or salts of optical isomers (Kan. Stat. Ann. § 65-4113(e)); any compound, mixture or preparation containing any detectable quantity of pseudoephedrine, its salts or optical isomers, or salts of optical isomers (Kan. Stat. Ann. § 65-4113(f)).

[2] Adderall is a Schedule II federally controlled substance. *See* 21 C.F.R. § 1308.12(d)(1) (amphetamine salts).

was amended to a misdemeanor crime of "possession of drug paraphernalia" involving "a sock" used "to store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance" in violation of Kan. Stat. Ann. § 21-36a09 (now Kan. Stat. Ann. § 21-5709(b)(2)) on April 4, 2010. C.A. Admin. Rec. 152. The amended charge did not reference a particular substance. *Id.* Mellouli pled guilty in July 2010 to the amended charge and was sentenced to 359 days in jail unimposed with twelve months of probation. C.A. Admin. Rec. 153-58.

2. The government arrested Mellouli in February 2012 and charged him with removability under 8 U.S.C. § 1227(a)(2)(B)(i). C.A. Admin. Rec. 288-90. The conviction documents submitted by the government (the amended complaint, the plea agreement, and the entry of judgment and sentencing document) did not specify the controlled substance involved in Petitioner's misdemeanor conviction. C.A. Admin. Rec. 152-58, 290.

Mellouli argued to the Immigration Judge that the conviction record failed to "specify the controlled substance at issue, and that therefore the government has not shown that his conviction involved a controlled substance as defined in section 102 of the Controlled Substances Act." Pet. App. 30-31. The Immigration Judge concluded that the government did not have to identify the controlled substance at issue to establish by clear and convincing evidence that Mellouli was convicted of a crime encompassed by 8 U.S.C. § 1227(a)(2)(B)(i). Pet. App. 33. The Immigration Judge relied on *Matter of Martinez Espinoza*, 25 I. & N. Dec. 118 (B.I.A. 2009), to conclude that the Kansas

definition of controlled substances did not have to "map perfectly" with the federal definition in 21 U.S.C. § 802 because the Kansas drug paraphernalia law "is plainly intended to criminalize behavior involving the production or use of drugs." Pet. App. 33-34. Because the conviction involved "other conduct associated with drug trade in general," the particular controlled substance involved in his conviction was irrelevant. Pet. App. 26.

The Board of Immigration Appeals affirmed the Immigration Judge's decision by finding that a "conviction for possession of drug paraphernalia involves drug trade in general, and thus, is covered under" 8 U.S.C. § 1227(a)(2)(B)(i). Pet. App. 18.

3. Mellouli filed a petition for review with the Eighth Circuit on September 5, 2012. C.A. Pet. Br. 7. He argued that the government failed to meet its burden to prove that he was convicted of violating a law related to a controlled substance, as defined by 21 U.S.C. § 802, because (1) the record of conviction did not specify the substance associated with the paraphernalia, (2) the paraphernalia – a sock – lacked connection with any particular substance, and (3) Kansas law includes substances that are not included on the federal controlled substance list. *See* n.1 *supra;* C.A. Pet. Br. 15. The government argued that Mellouli's conviction under the Kansas statutory scheme undoubtedly involved "the drug trade in general, and that is all that is needed to establish that his possession of drug paraphernalia conviction is a violation of a state law relating to a controlled substance." C.A. Resp. Br. 14.

The Eighth Circuit denied the petition for review, finding it was reasonable for the Board to conclude that any Kansas conviction for misdemeanor possession of drug paraphernalia was categorically a violation of a law relating to a controlled substance within the meaning of 8 U.S.C. § 1227(a)(2)(B)(i). Pet. App. 10. After asking for and receiving a response from the government, the Eighth Circuit denied Petitioner's petition for panel rehearing and rehearing *en banc*, despite the split created by the Third Circuit's decision in *Rojas v. Attorney General*, 728 F.3d 203, 219 n.18 (3d Cir. 2013) (en banc). Pet. App. 36-37. Four judges voted to grant the petition for rehearing *en banc*. Pet. App. 36.

REASONS FOR GRANTING THE PETITION

I. This decision and the Ninth Circuit's decision conflict irreconcilably with decisions of the Third and Seventh Circuits on an important and recurring issue of immigration law.

The Eighth Circuit's decision allows Mellouli's removal based on a drug paraphernalia offense with no connection in the record to any substance listed in 21 U.S.C. § 802. Had Mellouli's appeal been decided by the Third or Seventh Circuit, the outcome would have been different—those courts would have reversed the removal order because the paraphernalia conviction was not linked to a substance listed on the federal schedules. The Third Circuit *en banc* addressed the identical statutory question just weeks after the Eighth Circuit's decision in *Mellouli*. *Rojas*, 728 F.3d at 219 n.18. The Third Circuit acknowledged *Mellouli* and explicitly declined to follow it. *Id.*

When he petitioned for rehearing and rehearing *en banc*, Mellouli raised the conflict with the Third Circuit. But the Eighth Circuit denied rehearing nonetheless, entrenching the circuit split. Additionally, the Ninth Circuit declined *en banc* review of a case currently before this Court that interprets the nearly identical controlled substance offense definition in 8 U.S.C. § 1182(a)(2)(A)(i)(II) consistent with the Eighth Circuit and in conflict with the Third and Seventh. *Madrigal-Barcenas*, 507 F. App'x at 715-16.

The circuit conflict addresses an issue that occurs frequently and is fundamental to noncitizens and their families. Tens of thousands of noncitizens are removed annually for offenses relating to dangerous drugs. In 2012, 42,620 noncitizens were removed for offenses relating to dangerous drugs, amounting to 21.4% of all those removed. John F. Simanski & Lesley M. Sapp, *Immigration Enforcement Actions: 2012* at 7 (Dec. 2013).[3] Reflecting the importance of this removability ground, the meaning of the controlled substance offense provision is the subject of three published Board precedents. *Matter of Davey*, 26 I. & N. Dec. 37, 39 (B.I.A. 2012); *Martinez Espinoza*, 25 I. & N. Dec. at 121; *Matter of Paulus*, 11 I. & N. Dec. 274, 276 (B.I.A. 1965) (interpreting prior version of the statute codified at 8 U.S.C. § 1251(a)(11)).

It is likely that resolution of this issue will equally affect admissibility of aliens under 8 U.S.C. § 1182(a)(2)(A)(i)(II), which has nearly identical

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[3] Available at: https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2012_0.pdf (last visited Feb. 24, 2014).

language: "any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of ... a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21) ... is inadmissible."

A. The Third and Seventh Circuits read the text of Section 802 to require a paraphernalia conviction to be related to a substance listed on a federal schedule.

In *Rojas*, the Third Circuit by a 12-2 vote held that a state conviction for possessing drug paraphernalia did not make a noncitizen removable because it did not indicate that the paraphernalia was related to a federally controlled substance. 728 F.3d at 204. The court based its decision on the text of 8 U.S.C. § 1227(a)(2)(B)(i), which states that an alien is deportable if he "has been convicted of a violation of ... any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21)" other than certain marijuana offenses. *Id.* at 208-09.

Rojas's plea and colloquy did not reveal the drug involved in his conviction. The initial charging instrument stated that it was "loose cigar paper and [a] plastic baggie" containing marijuana, but (like Mellouli) Rojas's plea was to an amended charging instrument that did not specify the drug involved. *Id.* at 206. Rojas argued at each level of his deportation proceeding that the conviction did not satisfy Section 1227(a)(2)(B)(i) because it did not relate to a substance

"defined in section 208 of Title 21," but he was unsuccessful before the Immigration Judge and Board of Immigration Appeals. *Id.* at 206-07.

The Third Circuit reversed, ruling that the unambiguous statutory language mandates a showing that the paraphernalia conviction relates to a federally listed controlled substance. "[T]he most straightforward reading of § 1227(a)(2)(B)(i) is that to establish removability the Department must show that 'a controlled substance' included in the definition of substances in section 802 of Title 21 was involved in the crime of conviction at issue." *Id.* at 209. The Court performed detailed statutory analysis: "Reading the statute as written, it is clear that the parenthetical '(as defined in section 802 of Title 21)' is a restrictive modifier that affects only its immediate antecedent term, 'a controlled substance.'" *Id.* "Parsing the different clauses with the aid of the 'last antecedent' canon reveals that, as a whole, § 1227(a)(2)(B)(i) requires the Department to establish that the individual it seeks to remove (1) is an alien (2) who at any time after entering the country violated or attempted to violate a law relating to a controlled substance and (3) that the controlled substance is defined as such by federal law." *Id.*

To allow a broader reading, thereby permitting deportation based on convictions relating to substances not listed in 21 U.S.C. § 802, would allow states to make noncitizens deportable by criminalizing substances excluded from the federal law, violating "the cardinal principle that we do not cripple statutes by rendering words therein superfluous " *Id.* The court rejected as "atextual" the government's argument

that it had to prove a federally controlled substance only when the proceedings were based on "'possessory' offenses," *id.* at 211, and deemed the government's argument that a particular state's schedules as a whole may "relate to" controlled substances listed on the federal schedules to be inconstant with plain grammar and leading to results Congress could not have intended, *id.* at 212.

The Third Circuit recognized that, for removal based on drug *possession*, the circuits had uniformly required that the noncitizen be convicted of possessing a drug on the federal schedule. *Id.* at 211. It found no statutory support for treating other crimes—such as paraphernalia crimes—any differently than possession offenses, noting that there is no support in the text of the law "for the proposition that the Department's burden of proof changes depending on the type of drug offense involved in the removal proceeding." *Id.* The court rejected the government's interpretation, which applies a different analysis to drug possession offenses than to drug paraphernalia offenses. This two-pronged approach would make a noncitizen deportable for possessing paraphernalia associated with a drug, although possessing the drug itself would not be a deportable offense. *Id.* at 211. The "Department's reading," the court warned, "would result in a patchwork of removability rules dependent on the whims of the legislatures of the fifty states—effectively permitting them to control who may remain in the country via their controlled-substances schedules—not to mention the laws of all foreign nations, which may ban substances that are commonplace in the United States, such as poppy seeds." *Id.* at 213.

The Third Circuit determined that because Section 1227(a)(2)(B)(i) "requires the Department to establish that a foreign national's conviction is both (1) under a law relating to a controlled substance, and (2) involved or implicated a drug defined in section 802 of Title 21" and Rojas's conviction record did not establish the drug involved, his removal order was defective. *Id.* at 214. The court remanded for the Board to determine whether the government should be allowed to satisfy the statute's requirements through the record of conviction or other permissible documents. *Id.* at 219-20.

The Seventh Circuit took the same approach, holding that a paraphernalia conviction had to relate to a substance listed at 21 U.S.C. § 802 to justify removal under Section 1227(a)(2)(B)(i). *Desai v. Mukasey*, 520 F.3d 762 (7th Cir. 2008). Desai's state conviction was for selling a "look-alike" substance, namely candy that Desai believed contained Psilocybin, a hallucinogen defined by the Controlled Substances Act as a controlled substance. *Id.* at 763-64. Although the candy did not actually contain the drug, the Seventh Circuit found that the crime met the statutory definition because it was "relat[ed] to a controlled substance (as defined in section 802 of Title 21)." *Id.* at 765. The court said that its "task is simply to examine whether the state law is one relating to a federal controlled substance." *Id.* at 766. *Desai* construes "controlled substance (as defined in section 802 of Title 21)" consistently with the Third Circuit's statutory construction—but contrary to the Eighth Circuit's in this case—that the "parenthetical can only be read to modify 'controlled substance,' its immediate

antecedent." *Id.*; *see also Rojas*, 728 F.3d at 209 (construing the language identically).

The Seventh Circuit concluded that the statutory term "related to" allowed States to criminalize a wide range of conduct "related to" a federally controlled substance, but if Congress had wanted a direct correspondence between the state crimes and federal crimes supporting exclusion, "it would have used a word like 'involving' instead of 'relating to. . .'" *Id.* at 766. At the same time, the statutory language dictates that the substance involved in the crime must be on the federal schedule: "If a state decides to outlaw the distribution of jelly beans, then it would have no effect on one's immigration status to deal jelly beans, because it is not related to a controlled substance listed in the federal [Controlled Substances Act]." *Id.* Desai was removable because he was convicted of violating "a state law that is related to a federal controlled substance." *Id.* at 765.

When addressing state convictions for drug *possession*, the Ninth Circuit has construed the statute in the same way as the Third and Seventh Circuits, requiring that the drug at issue be covered by the Controlled Substances Act. *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1076 (9th Cir. 2007) (stating that "[t]he plain language of this statute requires the government to prove that the substance underlying an alien's state law conviction for possession is one that is covered by Section 102 of the [Controlled Substances Act]."), *abrogation on other grounds recognized by Cardozo-Arias v. Holder*, 495 Fed. App'x 790, 792 n.1 (9th Cir. 2012). The Board of Immigration Appeals takes this same approach to possession convictions. *See Paulus*,

11 I.& N. Dec. 274. But as explained below, the Ninth Circuit and Board have taken a different interpretive tack when addressing paraphernalia convictions.

B. The Eighth and Ninth Circuits' approach to paraphernalia convictions, like that of the Board of Immigration Appeals, conflicts irreconcilably with the Third and Seventh Circuits.

The Eighth and Ninth Circuits have developed a different approach to paraphernalia convictions that does not require proof that the paraphernalia is related to a substance on the schedules at 21 U.S.C. § 802, an approach the Third Circuit labeled "atextual." *Rojas*, 728 F.3d at 211; *see Mellouli v. Holder*, 719 F.3d 995 (8th Cir. 2013); *Luu-Le v. INS.*, 224 F.3d 911 (9th Cir. 2000). The Ninth Circuit initiated this approach in *Luu-Le*, which was the first reported federal appellate decision to address the immigration consequences of a paraphernalia conviction. 224 F.3d at 914.

The Ninth Circuit noted that the state statute under which Luu-Le was convicted "does not map perfectly the definition of 'controlled substance' as used in [8 U.S.C. 1227(a)(2)(B)(i)]," but the state statute, the court stated, "is clearly a law 'relating to' a controlled substance" and "is plainly intended to criminalize behavior involving the production or use of drugs—at least some of which are also covered by the federal schedules" in 21 U.S.C. § 812. *Id.* at 915.[4] Unlike the

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[4] The Ninth Circuit has used this approach in other paraphernalia cases. *United States v. Oseguera-Madrigal*, 700 F.3d 1196, 1198-99

Third and Seventh Circuits, the Ninth Circuit focused solely on its view of the state statute's purpose, not the conviction at issue. *Id.* at 913-14. *Luu-Le* held that any conviction under Arizona's drug paraphernalia law necessarily makes a noncitizen deportable under Section 1227(a)(2)(B)(i). *Id.* at 915-16.

Without supplying a different textual analysis, the Ninth Circuit applies a different rule to paraphernalia offenses than to possession offenses. As explained above, *see supra* § I.A, the Ninth Circuit requires that a possession conviction must be connected to a federally listed substance to justify removal under Section 1227(a)(2)(B)(i). *Ruiz-Vidal*, 473 F.3d at 1076.

In *Martinez Espinoza*, the Board of Immigration Appeals followed *Luu-Le*'s approach to paraphernalia crimes. 25 I. & N. Dec. at 122. The agency stated that it had "long drawn a distinction between crimes involving the possession or distribution of a *particular* drug and those involving other conduct associated with the drug trade in general." *Id.* at 121. The Board declined to require "a correspondence between the Federal and State controlled substance schedules" as it requires for possession offenses "because the primary purpose of the law was to eliminate or control traffic in narcotics." *Id.* (internal quotations omitted).

Like the Ninth Circuit, the Board applies a different standard to paraphernalia offenses than to possession offenses without offering any different interpretation of

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(9th Cir. 2012); *Estrada v. Holder*, 560 F.3d 1039, 1042 (9th Cir. 2009); *Bermudez v. Holder*, 586 F.3d 1167, 1168-69 (9th Cir. 2009) (per curiam).

the statutory text. Since its 1965 decision in *Paulus*, the Board has required a possession offense to be related to a substance on the federal schedule to support removal, 11 I. & N. Dec. at 276, but its self-labeled "common-sense" approach disregards that requirement for "drug trade" crimes, *Martinez Espinoza*, 25 I. & N. Dec. at 121-22, despite the identical statutory language governing both types of offenses.

The Eighth Circuit followed the approaches of the Ninth Circuit and Board in this case. The documents reflecting Mellouli's conviction did not reveal any federally controlled substance, but the Eighth Circuit concluded that significant overlap between the state and federal schedules left "little more than a 'theoretical possibility' that a conviction for a controlled substance offense under Kansas law will *not* involve a controlled substance as defined in 21 U.S.C. § 802." *Mellouli*, 719 F.3d at 997 (citations omitted). The court found the statutory language ambiguous (contrary to the Third Circuit) then quoted and deferred to *Martinez Espinoza*'s statement about the longstanding distinction between possession offenses and those involving "the drug trade in general" to conclude that all offenses involving "the drug trade in general," including Mellouli's paraphernalia offense, are covered by 8 U.S.C. § 1227(a)(2)(B)(i). *Id.* at 999-1000 (citing deference principles in *Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). Because the Eighth Circuit ruled that paraphernalia offenses like Mellouli's are "categorically" violations of Section 1227(a)(2)(B)(i), it rejected as irrelevant Mellouli's argument that the record of conviction submitted by the government failed to establish the substance

involved, even under the modified categorical approach. *Id.* at 1000;[5] *see Descamps v. United States*, 133 S. Ct. 2276, 2282, 2285 (2013) (explaining modified categorical approach).

In *Rojas*, the Third Circuit explained that it construed the statutory language differently than these courts:

> To be sure, this line of cases would provide the proper rubric of analysis if the question at issue was whether paraphernalia statutes "relate to" controlled substances, which neither party contests. But the Department asks us to extrapolate the "relating to" cases to conclude that so long as a state's controlled-substances schedules "show[ ] substantial (and obviously intentional) overlap" with the federal schedules, a drug-paraphernalia conviction satisfies the removability provision of § 1227(a)(2)(B)(i) even if the actual substance involved is not evident from the record of conviction. This we decline to do. The proposed use of the "relating to" cases is merely a repackaged version of the argument that "relating to" modifies both "controlled substance" as well as the "as defined" parenthetical, a reading we have already

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[5] The Eleventh Circuit also has affirmed removal based on a paraphernalia conviction, but the petitioner in that case did not present any argument relating to the statutory reference to 21 U.S.C. § 802. *Alvarez Acosta v. U.S. Att'y Gen.*, 524 F.3d 1191, 1196 (11th Cir. 2008). In an unpublished per curiam opinion without analysis of the statutory language, the Fourth Circuit also affirmed removal based on a paraphernalia conviction. *Castillo v. Holder*, 539 Fed. App'x 243 (4th Cir. 2013).

> rejected. In other words, the invitation to read "relating to" as modifying the parenthetical is but a thinly-veiled suggestion that we permit those words to excise the parenthetical entirely.

728 F.3d at 217 (internal citations omitted).

II. The Eighth Circuit's decision is incorrect for reasons in addition to those set forth by the Third and Seventh Circuits.

A. The evolution of the statutory language supports the approach of the Third and Seventh Circuits.

The evolution of the relevant federal statutory language demonstrates congressional intent that immigration consequences attach only to convictions associated with federally controlled substances. Before 1986, the controlled substance offense provision made deportable a noncitizen who:

> is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or who has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of

> opium or coca leaves or isonipecaine or any addiction-forming or addiction-sustaining opiate.

8 U.S.C. § 1251(a)(11) (1982); Pub. L. 99-570, § 1751, 100 Stat. 3207 (Oct. 27, 1986) (amending statute); Pub. L. 104-208, § 108, 110 Stat. 3009 (Sept. 30, 1996) (redesignating statute).

In its prior form, the statute specified not only the substances justifying deportability, but also the very crimes supporting deportability—the "manufacture, production, compounding, transportation," etc. Congress changed that approach in 1986, when it removed the specification of prohibited conduct and replaced it with "any law or regulation of a State, the United States, or a foreign country." Pub. L. 99-570, § 1751(a)(1). The 1986 amendment also eliminated the list of substances with which that conduct must be associated and replaced it with "a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))." *Id.*

These amendments allowed the States to specify which drug-related offenses could support deportability while retaining for the federal government the power to define the substances with which those offenses must be tied. Congress continued to define the substances that must be implicated by a state offense, limiting them to those that are federally controlled. *See, e.g.*, *Lopez v. Gonzalez*, 549 U.S. 47, 55-58 (2006) (rejecting an interpretation of the aggravated felony definition for illicit trafficking that depends on the States' classification of an offense as a felony instead of the federal classification). The Eighth Circuit's rule, which does not require evidence that the state conviction involved a federally controlled substance,

cuts the mooring to the federal list of substances that Congress retained when amending the statute.

Other provisions in the Immigration and Nationality Act demonstrate congressional intent to specify the substances that can result in removal. Section 1182(a)(2)(C)(i) renders a noncitizen inadmissible if there is reason to believe she "is or has been an illicit trafficker in any controlled substance or in *any listed chemical* (as defined in section 802 of title 21)." 8 U.S.C. § 1182(a)(2)(C)(i) (emphasis added). Here Congress has included a broader list of substances rendering an individual inadmissible—a list that includes ephedrine and pseudoephedrine, which are absent from Section 1227(a)(2)(B)(i). By distinguishing among the substances that carry immigration consequences in different parts of the immigration statutes, Congress has evidenced its intent to retain authority over and maintain uniformity across the substances that trigger removability, while delegating to the States the authority to define the prohibited conduct associated with those substances.

B. Kansas's law exemplifies the problem arising when federal courts apply a different standard to paraphernalia convictions than to possession convictions.

Kansas's laws well-illustrate the problem that arises when federal courts untether their Section 1227(a)(2)(B)(i) analysis from the requirement that each conviction relate to a substance on the federal schedule. Kansas's pre-2009 laws relating to ephedrine and pseudoephedrine are a good example. Before 2009, Kansas state law prohibited possession with intent to

use "any drug paraphernalia to ... manufacture, compound, convert, produce .... sell or distribute a controlled substance in violation of the uniform controlled substances act." Kan. Stat. Ann. § 65-4152(a)(3) (repealed by L. 2009, ch. 32, § 64). It also prohibited possession of ephedrine and pseudoephedrine. Kan. Stat. Ann. § 65-7006 (repealed by L. 2009, ch. 32, § 64). Ephedrine and pseudoephedrine can be used to manufacture methamphetamine and are currently listed in Kansas's Controlled Substance schedules. Kan. Stat. Ann. § 65-4113; *State v. Campbell*, 106 P.3d 1129, 1129 (Kan. 2005). They are also active ingredients in over-the-counter products such as Advil Cold & Sinus and herbal ephedra.[6] The drugs are included as "List I" chemicals in the federal Controlled Substance Act, but are not on the federal schedules of "controlled substances." 21 U.S.C. § 802(6), (34)(C) & (K).

Under Kansas's prior law, possession of ephedrine or pseudoephedrine could support convictions both for a possession offense (Kan. State. Ann. § 65-7006) and for possession of the drugs that also constituted methamphetamine paraphernalia (Kan. Stat. Ann. § 65-4152(a)(3)). *See, e.g.*, *State v. Snellings*, 273 P.3d 739, 742 (Kan. 2012); *State v. Schoonover*, 133 P.3d 48, 59 (Kan. 2006); *Campbell*, 106 P.3d at 1134.

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[6] *See* National Institutes of Health, U.S. National Library of Medicine, Daily Med, Advil Cold and Sinus Drug Facts, *available at* http://dailymed.nlm.nih.gov/dailymed/lookup.cfm?setid=0da9ed22-bfb4-d61b-110b-0c7760332a98; National Institute of Health's National Center for Complementary and Alternative Medicines, Ephedra Fact Sheet, *available at* http://nccam.nih.gov/health/ephedra.

Consequently, even though the same conduct could underlie both offenses, under the Eighth Circuit's rule a possession conviction would not trigger deportability while the paraphernalia conviction would. This inconsistency illustrates the practical problem arising from the Eighth Circuit's attenuation of paraphernalia convictions from the specification of substances in the Controlled Substances Act.

III. This case presents an appropriate opportunity for the Court to address this issue.

1. This issue has been presented to the Court in *Madrigal-Barcenas v. Holder*, No. 13-697, in which the petition for certiorari remains pending as of the date Mellouli's petition is filed. If the Court grants certiorari in *Madrigal-Barcenas*, Mellouli asks that this Court defer the disposition of his petition until *Madrigal-Barcenas* is resolved on the merits.

This case presents at least as good an opportunity as *Madrigal-Barcenas* to resolve the question presented. Proper application of Section 1227(a)(2)(B)(i) is Mellouli's only barrier to returning to his life in the United States as a lawful permanent resident; he needs no relief that would involve discretionary determinations for which he would bear the burden of proof. Further, Mellouli's case presents a thorough, published panel decision, which the Eighth Circuit declined to revisit *en banc* after considering the parties' arguments against the approach taken by the Third and Seventh Circuits.

Additionally, although Mellouli's initial charging instrument and a probable cause affidavit referred to

Adderall, the amended charging instrument (to which he pled) alleged a paraphernalia offense and made no mention of the substance involved. The record submitted by the government did not include the plea colloquy, and there is no dispute that the other evidence submitted by the government and available for consideration using the categorical method failed to establish the substance that underlay Mellouli's conviction. *See Nijhawan v. Holder*, 557 U.S. 29, 42 (2009). Because Kansas's law criminalized several substances in addition to those listed at 21 U.S.C. § 802, the present record cannot establish that his paraphernalia conviction involved a federally listed illegal drug. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013) (stating that the Court must "presume that the conviction 'rested upon nothing more than the least of the acts' criminalized" (alterations omitted)).

2. Further proceedings are required to determine whether Mellouli's conviction necessarily violated Section 1227(a)(2)(B)(i) if the modified categorical approach applies. *Descamps* limited use of the modified categorical approach, which allows judicial examination of certain documents to situations where (1) a defendant was convicted under a statute containing alternative crimes and (2) the removability determination depends on which elements underlay the crime for which that defendant was convicted. 133 S. Ct. at 2285.

3. The Eighth Circuit determined that Kansas Statutes § 21-5709(b)(2) was a categorical match with Section 1227(a)(2)(B)(i) under *Moncrieffe*, reasoning incorrectly that variance between the state and federal definitions of "controlled substance" did not render the

Kansas statute overbroad because the phrase "relating to" brought any drug offense in a state that controlled most of the same substances controlled federally within the scope of the federal statute. *Mellouli*, 719 F.3d at 1001-02. This interpretation commits the same error as the Eighth Circuit in *Lopez v. Gonzalez*, 417 F.3d 934 (8th Cir. 2005). Construing 18 U.S.C. § 924(c)(2), the Eighth Circuit had affirmed the government's interpretation of the words "any felony punishable under the Controlled Substances Act" to mean, in this Court's words, any "felony punishable under the [Controlled Substance Act] whether or not as a felony." *Lopez*, 549 U.S. at 56. This Court corrected the Eighth Circuit's misinterpretation of the generic federal definition of illicit drug trafficking in 8 U.S.C. § 1101(a)(43)(B) and remanded. *Id.* at 60. The same result is required here.

Under the categorical approach, a state conviction for paraphernalia associated with jimson weed or pseudoephedrine, for example – substances unlawful in Kansas but not on the federal schedule – would not trigger removability, while paraphernalia associated with a substance controlled by both the state and federal governments would. Regarding the modified categorical approach, neither the Board nor the Eighth Circuit determined whether the Kansas statute prohibiting possession drug paraphernalia in connection with a controlled substance is divisible by substance and therefore subject to analysis under the modified categorical approach. As in *Lopez*, this Court should establish the proper interpretation of the federal statute so that the Board can determine in the first instance whether the government can meet its burden to show that Mellouli's paraphernalia

conviction under Kansas law fits within the federal definition. *See Gonzales v. Thomas*, 547 U.S. 183, 187 (2006) (per curiam) (holding that agency, not the court of appeals, must apply the law to the facts in the first instance).

CONCLUSION

For the reasons provided above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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February 25, 2014

APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A Opinion/Judgment, United States Court of Appeals for the Eighth Circuit (July 9, 2013) . App. 1

Appendix B Decision of the Board of Immigration Appeals, United States Department of Justice, Executive Office for Immigration Review (August 7, 2012) App. 17

Appendix C Order of the Immigration Judge, United States Department of Justice, Executive Office for Immigration Review, Immigration Court (May 8, 2012) . App. 20

Appendix D Written Decision of the Immigration Judge, United States Department of Justice, Executive Office for Immigration Review, Immigration Court (May 1, 2012) App. 23

Appendix E Written Decision of the Immigration Judge, United States Department of Justice, Executive Office for Immigration Review, Immigration Court (March 27, 2012) . App. 29

Appendix F Order, United States Court of Appeals for the Eighth Circuit (October 28, 2013) App. 36

Appendix G Statutes App. 38
8 U.S.C. § 1227 App. 38
21 U.S.C. § 802 App. 39
Kan. Stat. Ann. § 21-5701 App. 39
Kan. Stat. Ann. § 21-5709 App. 39

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 12-3093

[Filed July 9, 2013]

Moones Mellouli

Petitioner

v.

Eric H. Holder, Jr., Attorney General of the United States

Respondent

Petition for Review of an Order of the Board of Immigration Appeals

Submitted: February 13, 2013
Filed: July 9, 2013

Before RILEY, Chief Judge, LOKEN and SHEPHERD, Circuit Judges.

LOKEN, Circuit Judge.

Section 237(a) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1227(a), lists classes of aliens lawfully present in this country who are removable (deportable) from the United States. One subsection provides:

> Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

8 U.S.C. § 1227(a)(2)(B)(i) (emphasis added). Moones Mellouli, a citizen of Tunisia and a lawful permanent resident of the United States, petitions for review of an order of the Board of Immigration Appeals ("BIA") that he is removable because his July 2010 conviction for violating a Kansas drug paraphernalia statute was a conviction "relating to a controlled substance" within the meaning of § 1227(a)(2)(B)(i). Mellouli argues on appeal, as he did to the BIA, that he is not removable because the state court record of conviction does not identify the controlled substance underlying his state paraphernalia conviction, and therefore the government failed to prove that the conviction related to a *federal* controlled substance, as § 1227(a)(2)(B)(i) requires. We have jurisdiction to review this issue of law. See Bobadilla v. Holder, 679 F.3d 1052, 1053 (8th Cir. 2012), applying 8 U.S.C. § 1252(a)(2)(D). Although the question is not free from doubt, compare Moncrieffe

v. Holder, 133 S. Ct. 1678 (2013), with Nijhawan v. Holder, 557 U.S. 29 (2009), we join our sister circuits that have upheld the BIA's application of the "relates to" provision in § 1227(a)(2)(B)(i) and deny the petition for review.

I. The Statutory Landscape

The government has the burden to establish removability by clear and convincing evidence. See 8 U.S.C. § 1229a(c)(3)(A); Bobadilla, 679 F.3d at 1058. The primary issues presented by this appeal are whether the government must prove that a specific controlled substance defined in 21 U.S.C. § 802 was the basis for a state drug paraphernalia conviction, and if so, what evidence the government may use to prove that aspect of the conviction. In our view, proper resolution of these issues requires an understanding of a complex federal and state statutory universe.

Congress in the Controlled Substances Act of 1970 established five lengthy schedules of controlled substances, see 21 U.S.C. § 812, and defined controlled substance as meaning a drug or precursor included in those schedules, see 21 U.S.C. § 802(6), the statute cross-referenced in 8 U.S.C. § 1227(a)(2)(B)(i). That same year, the National Conference of Commissioners on Uniform State Laws approved the Uniform Controlled Substances Act, describing as its purpose:

> The 1970 Uniform Act was designed to complement the federal Controlled Substances Act, which was enacted in 1970. This Uniform Act was drafted to maintain uniformity between the laws of the several States and those of the federal government. It has been designed

> to complement the federal law and provide an interlocking trellis of federal and state law to enable government at all levels to control more effectively the drug abuse problem.

Unif. Controlled Substances Act (amended 1994), 9 U.L.A. 5, Pt. II. The Uniform Act has the same five schedules as 21 U.S.C. § 812. Nearly all States have adopted the Uniform Act. Some States added a small number of substances not listed on the federal schedules. In addition, not every State amended its schedules to adopt revised versions of the Uniform Act in 1990 and 1994, or to incorporate changes to the federal schedules over the years. Thus, the drugs listed on a State's schedules may not "map perfectly" with the federal schedules. In re Huerta-Flores, A092-444-014, 2010 WL 5808899 (BIA Aug. 27, 2010) (unpublished), quoting Luu-Le v. INS, 224 F.3d 911, 915 (9th Cir. 2000). In that decision, the BIA noted that the Arizona and federal schedules at issue were identical except for the continued listing on Arizona's Schedule I of two drugs whose federal listing had expired.

Kansas adopted the Uniform Act in 1972. Kansas Schedules I-V, now appearing in Kan. Stat. Ann. §§ 65-4105 to 65-4113, list, for each controlled substance that is also a controlled substance under federal law, the corresponding code number from the federal schedules. Of the hundreds of substances currently listed, less than a handful have no federal code number. A controlled substance for purposes of Kansas criminal drug offenses means a substance listed in the Kansas Schedules I-V. Kan. Stat. Ann. § 21-5701(a). Thus, there is little more than a "theoretical possibility" that a conviction for a controlled substance offense under

Kansas law will *not* involve a controlled substance as defined in 21 U.S.C. § 802. Gonzalez v. Duenas-Alvarez, 549 U.S. 183, 193 (2007).

At issue in this case is a Kansas drug paraphernalia conviction. These statutes, too, have a relevant history. In 1979, concerned that the availability of drug paraphernalia "has reached epidemic levels," the Drug Enforcement Administration at the request of the President's Domestic Policy Council "prepared the Model Drug Paraphernalia Act . . . as an amendment to the Uniform Controlled Substances Act."[1] Kansas adopted this Model Act in 1981; Mellouli was convicted of violating an amended version of that statute. Because many States in enacting drug paraphernalia criminal offenses have adopted the Model Act, the question whether a conviction for a particular State's drug paraphernalia statute "relates to" a federal controlled substance is not likely to involve relevant differences in state statutory language. See Luu-Le, 224 F.3d at 915 (Arizona Drug Paraphernalia law); Bermudez v. Holder, 586 F.3d 1167, 1168-69 (9th Cir. 2009) (Hawaii); Estrada v. Holder, 560 F.3d 1039, 1042 (9th Cir. 2009) (California) United States v. Oseguera-Madrigal, 700 F.3d 1196, 1198-99 (9th Cir. 2012) (Washington).

II. The BIA's Decision

Following Mellouli's April 2010 arrest for driving under the influence of alcohol, detention center

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[1] Thomas Regnier, "Civilizing" Drug Paraphernalia Policy: Preserving Our Free Speech and Due Process Rights While Protecting Children, 14 N.Y.U. J. Legis. & Pub. Pol'y 115, 124 (2011) (quotations omitted).

deputies discovered four orange tablets in his sock bearing the inscription, "M Aphet Salts 30 mg." Mellouli admitted the tablets were Adderall, a drug listed on both the Kansas and federal controlled substance schedules. He was charged with the level 6 felony of "trafficking in contraband in a jail." On July 13, he pleaded guilty to the lesser offense charged in an amended complaint, misdemeanor possession of drug paraphernalia in violation of Kan. Stat. Ann. § 21-36a09(b), now recodified at § 21-5709(b). The amended complaint did not identify the controlled substance Mellouli stored in the paraphernalia, his sock.[2]

In Matter of Paulus, 11 I. & N. Dec. 274, 276 (BIA 1965), construing prior federal controlled substance and immigration laws, the BIA concluded that the alien was not deportable under then § 241(a)(11) of the INA[3] because his conviction for violating the Health and Safety Code of California "could have been for an offer to sell a substance which though a narcotic under

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[2] The statute provides, in relevant part: "It shall be unlawful for any person to use or possess with intent to use any drug paraphernalia to (2) store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body." It seems surprising to call a sock "drug paraphernalia," but using a sock to store and conceal a controlled substance falls within the statute's literal prohibition. Pleading guilty to a reduced paraphernalia offense after being charged with a serious controlled substance offense was also the fact pattern in Oseguera-Madrigal, 700 F.3d at 1198, so this type of paraphernalia conviction may be neither uncommon nor unfairly punitive.

[3] This statute made deportable an alien who "has been convicted of a violation of any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana." Paulus, 11 I. & N. Dec. at 275, quoting former 8 U.S.C. § 1251(a)(11).

California law is not a narcotic drug under federal laws [and therefore] we cannot say that the Service has borne its burden of establishing that [the alien] has been convicted of a violation of a law relating to narcotic drugs."

In this case, Mellouli argued to the BIA, Paulus is controlling BIA authority, so a state drug paraphernalia conviction does not fall within § 1227(a)(2)(B)(i) unless the paraphernalia was connected to a federal controlled substance. Because the Kansas schedules include a few controlled substances not on the federal schedules, such as jimson weed, there is a possibility, however remote, that a Kansas drug paraphernalia conviction did not involve use in connection with a federal controlled substance. Mellouli further argued that this evidentiary issue must be decided using the "categorical" and "modified categorical" analysis applied by the Supreme Court in Taylor v. United States, 495 U.S. 575, 599-602 (1990), and Shepard v. United States, 544 U.S. 13, 26 (2005), criminal cases interpreting the Armed Career Criminal Act, 18 U.S.C. § 924(e), an analysis often but not uniformly applied in interpreting various provisions of the INA. Here, the Kansas statutes and the only documents reflecting his Kansas conviction that may be considered in applying the modified categorical approach did not identify a particular controlled substance. Therefore, Mellouli's argument concluded, the government failed to prove by clear and convincing evidence that he was convicted of an offense "relating to a controlled substance (as defined in section 802 of Title 21)."

Adhering to its prior decision in Matter of Martinez Espinoza, 25 I. & N. Dec. 118 (BIA 2009), the BIA rejected the initial premise underlying this complex argument -- that a drug paraphernalia conviction is not "related to" a federal controlled substance within the meaning of § 1227(a)(2)(B)(i) unless the conviction identified a particular controlled substance with which the paraphernalia was used. As the BIA explained in Martinez Espinoza:

> we have long drawn a distinction between crimes involving the possession or distribution of a *particular* drug and those involving other conduct associated with the drug trade in general. Thus, the requirement of a correspondence between the Federal and State controlled substance schedules, embraced by Matter of Paulus for cases involving the possession of particular substances, has never been extended to other contexts by the Board. For example, in Matter of Martinez-Gomez, 14 I&N Dec. 104, 105 (BIA 1972), we held that an alien's California conviction for opening or maintaining a place for the purpose of unlawfully selling, giving away, or using any narcotic was a violation of a law relating to illicit traffic in narcotic drugs under former section 241(a)(11) of the Act even though the California statute required no showing that only *Federal* narcotic drugs were sold or used in the place maintained, because the "primary purpose" of the law was "to eliminate or control" traffic in narcotics.

> The common-sense approach of Matter of Martinez-Gomez accords with the broad "relating to" language of current law and has largely been embraced by the courts.

Id. at 121-22, citing Luu-Le, 224 F.3d at 915, and Desai v. Mukasey, 520 F.3d 762, 764-65 (7th Cir. 2008). Relying on Martinez Espinoza, the BIA concluded that Mellouli's "conviction for possession of drug paraphernalia involves drug trade in general and, thus, is covered under [8 U.S.C. § 1227(a)(2)(B)(i)]."

III. Discussion

On appeal, Mellouli does not challenge prior decisions that state drug paraphernalia statutes may constitute laws "relating to a controlled substance" within the meaning of § 1227(a)(2)(B)(i). See Barma v. Holder, 640 F.3d 749, 751 (7th Cir. 2011); Alvarez Acosta v. U.S. Att'y Gen., 524 F.3d 1191, 1195-96 (11th Cir. 2008); Escobar Barraza v. Mukasey, 519 F.3d 388, 391-92 (7th Cir. 2008); Luu-Le, 224 F.3d at 914-15. Given the extensive federal involvement in preparing and urging States to enact the Model Drug Paraphernalia Act as part of "an interlocking trellis of federal and state law . . to control more effectively the drug abuse problem," we have no doubt that these state laws "relate to" federal control of illicit drugs.

Mellouli more narrowly argues (i) the BIA arbitrarily and capriciously ignored what should have been its own controlling decision in Paulus; (ii) the record-of-conviction documents that may be considered under the Supreme Court's modified categorical approach did not identify a federal controlled substance; (iii) the BIA erred in considering other

documents that referred to the controlled substance in his sock as Adderall; and therefore (iv) the government failed to prove he is removable under § 1227(a)(2)(B)(i). We reject this contention for three reasons.

First. In Martinez Espinoza, the BIA concluded that a state court drug paraphernalia conviction "relates to" a federal controlled substance because it is a crime "involving other conduct associated with the drug trade in general." 25 I. & N. Dec. at 121. We "must defer" to this interpretation of an ambiguous statute if it is neither arbitrary nor manifestly unreasonable. Popescu-Mateffy v. Holder, 678 F.3d 612, 615 (8th Cir. 2012), citing Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837 (1984). The BIA's conclusion is a reasonable interpretation of the term "relating to," a term that reflects congressional intent to broaden the reach of the removal provision to include state offenses having "a logical or causal connection" to federal controlled substances. See Webster's Third New International Dictionary 1916 (1961).

While the "map" may be imperfect, there is nearly a complete overlap between the definition of controlled substance in 21 U.S.C. § 802 and in the statutes of States such as Kansas that adopted the Uniform Controlled Substances Act. It was therefore reasonable for the BIA to conclude that any drug paraphernalia conviction in these States was, categorically, a violation of a law "relating to a controlled substance" within the meaning of 8 U.S.C. § 1227(a)(2)(B)(i). Accord Luu-Le, 224 F.3d at 915. "If Congress wanted a one-to-one correspondence between the state laws and the federal [schedules], it would have used a word like 'involving' instead of 'relating to.'" Desai, 520 F.3d at 766

(concluding that state statute prohibiting distribution of "look-alike" drugs was related to federal controlled substances; the "look-alike" substance was illegal because of its relation to a federally scheduled substance).

As the BIA correctly concluded that a conviction for violating the Kansas paraphernalia statute is, categorically, related to a controlled substance within the meaning of § 1227(a)(2)(B)(i), use of the modified categorical approach as urged by Mellouli is unnecessary. "All the modified approach adds is a mechanism for [comparing the elements of the state offense with the generic federal offense] when a statute lists multiple, alternative elements, and so effectively creates 'several different crimes.'" Descamps v. United States, No. 11-9540, slip op. at 8 (U.S. June 20, 2013), quoting Nijhawan, 557 U.S. at 41.

Second. We reject Mellouli's premise that Paulus was controlling agency authority the BIA arbitrarily ignored. While the BIA has not explicitly overruled Paulus, that case involved pre-1970 controlled substance and INA statutes and was ignored by the BIA in Huerta-Flores, where the BIA concluded that a state drug conspiracy conviction is a "categorically removable offense" when the state statute has "a list of narcotic drugs that is substantially identical to the federal one, and indeed was drafted with the obvious intent to match precisely with the federal schedules." 2010 WL 5808899 (unpublished). Given the close relationship between drug possession and drug conspiracy offenses, Huerta-Flores strongly signals that the BIA does not consider Paulus controlling in the post-1970 statutory era.

Third. The government's burden of proof included the need to establish by clear and convincing evidence that Mellouli's drug paraphernalia conviction did not fall within the exception in § 1227(a)(2)(B)(i) for "a single offense involving possession for one's own use of 30 grams or less of marijuana." To meet this burden, the government submitted documents *outside* the record of conviction, namely, the original Kansas complaint, to which Mellouli did not plead guilty, and a probable-cause affidavit. These documents established that his drug paraphernalia conviction did not implicate the personal use exception because Mellouli used his sock to conceal Adderall, a federal Schedule II controlled substance, not marijuana. Employing the "circumstance specific" approach adopted in Martinez Espinoza, 25 I. & N. Dec. at 123-24, the BIA concluded that the personal use exception did not apply because these documents established that Mellouli's paraphernalia conviction was connected to Adderall. On appeal, Mellouli does not challenge the BIA's conclusion that the exception did not apply. Rather, he argues that it was error to admit and rely on evidence outside the record of conviction.

In Nijhawan, the Supreme Court considered an INA provision defining "aggravated felony" to include "an offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." 8 U.S.C. § 1101(a)(43)(M)(i). The Court concluded that this monetary threshold was a specific circumstance underlying the conviction, not an element of the crime, and therefore immigration judges may consider evidence outside the record of conviction to determine whether the threshold was satisfied. 557 U.S. at 41-42. In our view, the BIA properly applied this

"circumstance specific" approach in determining that Mellouli's conviction fell outside the personal use exception. As the BIA explained in a subsequent decision:

> The language of the [personal use exception] is exceedingly narrow and fact-specific. It refers not to a common generic crime but rather to a specific type of conduct (possession for one's own use) committed on a specific number of occasions (a "single" offense) and involving a specific quantity (30 grams or less) of a specific substance (marijuana). Read in its most natural sense, this narrow language calls for what the Supreme Court has referred to as a "circumstance-specific" inquiry, that is, an inquiry into the nature of the alien's conduct.

Matter of Davey, 26 I. & N. Dec. 37, 39 (BIA 2012) (citations omitted). We agree. "Locating this exception in the INA proper suggests an intent to have the relevant facts found in immigration proceedings." Moncrieffe, 133 S. Ct. at 1691.

Mellouli argues, in effect, that this evidence was inadmissible until the government *first* proved that his conviction related to a federal controlled substance with record-of-conviction documents permitted by Shepard. But this ignores the need for efficient administrative proceedings. The government must prove its entire case in one submission, not by some artificial, bifurcated procedure. The government's case must include proof that the personal use exception does not apply. Evidence related to that issue is therefore admissible at the outset of the proceeding.

Mellouli more or less concedes that circumstance-specific evidence he concealed Adderall would be admissible to prove the personal use exception did not apply. His real objection is that the BIA may not rely on this type of evidence in deciding that his paraphernalia conviction was "related to" a federal controlled substance because it *in fact* involved a federal controlled substance. This objection is based upon categorical and modified categorical approaches that have generated persistent uncertainty and confusion; it therefore raises an interesting and potentially difficult evidentiary issue.[4] But this case does not present the question because (i) the BIA did not use circumstance-specific evidence for this purpose, and (ii) we have affirmed the BIA's categorical determination that Mellouli's drug paraphernalia conviction was within § 1227(a)(2)(B)(i), without regard to whether the paraphernalia was used in connection with a federally scheduled drug. The general rule that we do not decide academic questions is particularly wise in this situation, as we have no hint how the BIA would address this evidentiary issue in a case where the answer mattered to the ultimate issue of removability. Thus, we leave the issue for another day.

For the forgoing reasons, we deny the petition for review.

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[4] "[W]hen deciding how to classify convictions under criteria that go beyond the criminal charge -- such as the amount of the victim's loss, or whether the crime is one of 'moral turpitude,' the agency has the discretion to consider evidence beyond the charging papers and judgment of conviction." Ali v. Mukasey, 521 F.3d 737, 743 (7th Cir. 2008), cert. denied, 129 S. Ct. 2853 (2009); accord Matter of Silva-Trevino, 24 I. & N. Dec. 687, 700-02 (A.G. 2008).

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 12-3093

[Filed July 9, 2013]

Moones Mellouli	)
	)
Petitioner	)
	)
v.	)
	)
Eric H. Holder, Jr., Attorney General of the United States	)
	)
Respondent	)
	)

Petition for Review of an Order of the
Board of Immigration Appeals
(A087-317-931)

JUDGMENT

This cause was submitted on petition for review of an order from the Board of Immigration Appeals, on the original record and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the petition for review is denied in accordance with the opinion of this court.

July 09, 2013

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A087 317 931 Kansas City, MO Date: AUG 07 2012

In re: MOONES MELLOULI

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Michael Sharma-Crawford, Esquire

ON BEHALF OF DHS:
Jayme Salinardi
Acting Deputy Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)]
Convicted of controlled substance violation

APPLICATION: Termination

On March 27, 2012, the Immigration Judge found the respondent removable as charged. The respondent

filed a motion to reconsider on April 17, 2012. The Immigration Judge denied the respondent's motion to reconsider on May 1, 2012. The respondent timely appeals that decision. The respondent argues on appeal that the Immigration Judge erred in finding him removable under section 237(a)(2)(B)(i) of the Immigration and Nationality Act ("Act"), 8 U.S.C. 8 U.S.C. § 1227(a)(2)(B)(i). The Department of Homeland Security ("DHS") argues that the Immigration Judge was correct in finding that DHS met their burden of establishing removabilty. The appeal will be dismissed.

We have considered the respondent's arguments regarding (1) DHS's burden to establish that his conviction for possession of drug paraphernalia related to a controlled substance under the Controlled Substance Act, (2) the applicability of *Matter of Martinez Espinoza*, 25 I&N Dec. 118 (BIA 2009), and (3) the applicability of the circumstance-specific approach to the "single offense involving possession for one's own use of thirty grams or less of marijuana" exception. Upon review of controlling case law, we conclude that the Immigration Judge correctly denied the respondent's motion to reconsider. The respondent's conviction for possession of drug paraphernalia involves drug trade in general and, thus, is covered under 237(a)(2)(B)(i) of the Act. *See Matter of Martinez Espinoza*, 25 I&N Dec. 118 (BIA 2009). Additionally, the language of section 237(a)(2)(B)(i) of the Act, requiring that the conviction be other than "a single offense involving possession for one's own use of thirty grams or less of marijuana," invites an inquiry into the underlying facts of the case. A "circumstance specific" rather than a modified categorical approach is the

appropriate means for determining the nature of the crime. *See Nijhawan v. Holder*, 557 U.S. 29 (2009); *Matter of Martinez Espinoza*, *supra*. Conducting a circumstance-specific inquiry into the respondent's actions, the original complaint and probable cause affidavit sufficiently ties the respondent's conviction to an offense involving a controlled substance other than marijuana (Bond Exh. 2).

The respondent additionally argues on appeal that DHS should not have submitted the probable cause affidavit because (1) such documents are not made available under Kansas law without a written order of the court and (2) such documents are not part of the record of conviction. (Respondent's brief at 16). The respondent has not persuaded this Board that the DHS obtained the respondent's probable cause affidavit through illegal means. Additionally, under the circumstance-specific inquiry, an Immigration Judge may look to documents outside the record of conviction. *See Nijhawan v. Holder*, *supra*; *Matter of Martinez Espinoza, supra*. Finally, we find that the Immigration Judge exhibited no bias by considering the above argument as part of the "circumstance specific" analysis. (Respondent's brief at 18).

ORDER: The appeal is dismissed.

/s/Roger A. Pauley
FOR THE BOARD

APPENDIX C

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
2345 GRAND BLVD., STE 525
KANSAS CITY, MO 64108

Case No.: A087-317-931

[Filed May 8, 2012]

In the Matter of:	)
MELLOULI, MOONES	)
	)
DETAINED	)
	)
RESPONDENT	)
	)

Docket: KANSAS CITY IMMIGRATION COURT - IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

Upon the basis of respondent's admissions, I have determined that the respondent is subject to removal on the charge(s) in the Notice to Appear.

~~Respondent has made no application for relief from removal.~~ JOM

It is HEREBY ORDERED that the respondent be removed from the United States to TUNISIA on the charge(s) contained in the Notice to Appear.

It is FURTHER ORDERED that if the aforenamed country advises the Attorney General that it is unwilling to accept the respondent into its territory or fails to advise the Attorney General within 30 days following original inquiry whether it will or will not accept respondent into its territory, respondent shall be removed to TUNISIA.

If you fail to appear for removal at the time and place ordered by the DHS, other than because of exceptional circumstances beyond your control (such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances), you will not be eligible for the following forms of relief for a period of ten (10) years after the date you were required to appear for removal:

(1) Voluntary departure as provided for in section 240B of the Immigration and Nationality Act;

(2) Cancellation of removal as provided for in section 240A of the Immigration and Nationality Act; and

(3) Adjustment of status or change of status as provided for in section 245, 248 or 249 of the Immigration and Nationality Act.

/s/John R. O'Malley
JOHN R. O'MALLEY
Immigration Judge

Appeal: RESERVED/WAIVED (A/J/B) Date: May 8, 2012

[Certificate of Service Omitted in Printing of this Appendix]

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APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
2345 GRAND BOULEVARD, SUITE 525
KANSAS CITY, MISSOURI 64108

File No. A087-317-931

[Filed May 1, 2012]

IN THE MATTER OF	)
	)
Monnes MELLOULI	)
	)
RESPONDENT	)
	)

IN REMOVAL PROCCEEDINGS

CHARGE: Section 237(a)(2)(B)(i) of the Immigration and Nationality Act, as amended: Alien who at any time after admission has been convicted of any law or regulation relating to a controlled substance, other than a single offense involving possession for one's own use of thirty grams or less of marijuana.

APPLICATION: Motion to Reconsider

ON BEHALF OF THE RESPONDENT:
Michael Sharma-Crawford, Esq.
Sharma-Crawford Attorneys at Law
515 Avenida Cesar E. Chavez
Kansas City, MO 64108

ON BEHALF OF THE GOVERNMENT:
Jayme Salinardi, Esq.
Immigration and Customs Enforcement
2345 Grand Boulevard, Suite 500
Kansas City, MO 64108

WRITTEN DECISION OF THE IMMIGRATION JUDGE

I. Procedural History

On July 13, 2010, the respondent was convicted of Possession of Drug Paraphernalia in violation of K.S.A. § 21-36a09 in Johnson County, Kansas. *See* Group Exhibit 2, Tab C. On February 17, 2012, the Department of Homeland Security (DHS) personally served the respondent with a Notice to Appear (NTA), charging him with being removable pursuant to section 237(a)(2)(B)(i) of the Immigration and Nationality Act ("Act"), as amended. *See* Exhibit 1. After the respondent, through counsel, denied removability at a master hearing held March 20, 2012, this Court issued a written decision, dated March 27, 2012, sustaining the removal charge under 237(a)(2)(B)(i).

On April 17, 2012, the respondent filed a timely Motion to Reconsider Finding of Removability. *See* INA § 240(c)(6)(B) (establishing 30 day deadline for motions to reconsider). In his motion the respondent "dispute[s] that DHS met its burden of proving that he was convicted of a ... violation related to a substance that

appears on the *federal* controlled substances list." *See* Respondent's Motion to Reconsider, pg. 7. The respondent further contends that the Court erred in relying on *Matter of Martinez Espinoza*, 25 I&N Dec. 118 (BIA 2009), which he believes "is wholly inapplicable here." *Id.* Finally, the respondent argues that the Court erred in applying a circumstance-specific approach to determine whether the respondent was convicted of "a single offense involving possession for one's own use of thirty grams or less of marijuana." *Id.* at 8; *see also* INA § 237(a)(2)(B)(i). The DHS filed its Opposition to the Respondent's Motion to Reconsider on April 27, 2012.

II. Analysis

At the outset, it is important to point out that many of the arguments raised in the respondent's Motion to Reconsider were addressed in the Court's previous order of March 27, 2012. For example, in regard to his first argument—that DHS failed to establish his conviction for Possession of Drug Paraphernalia related to a substance covered by the CSA—this Court observed that the Board had considered an identical argument in *Matter of Martinez Espinoza*, *supra*. Specifically, the alien argued that "a drug paraphernalia conviction cannot support a finding of inadmissibility unless the paraphernalia was tied to a specific, federally controlled substance." *Matter of Martinez Espinoza* at 121. The Board disagreed, explaining that

> we have long drawn a distinction between crimes involving the possession or distribution of a *particular* drug and those involving other conduct associated with the drug trade in

> general. Thus, the requirement of a correspondence between the Federal and State controlled substance schedules, embraced by *Matter of Paulus* ... for cases involving the possession of particular substances, has never been extended to other contexts by the Board.

This reasoning is equally applicable here. The respondent's conviction does not involve the possession or distribution of a *particular* drug; rather, it involves other conduct associated with drug trade in general. Hence, the requirement of a correspondence between the Federal and State controlled substance schedules does not apply. The Ninth Circuit's decision in *Luu-Le v. INS*, 224 F.3d 911, 915 (9th Cir. 2000), further illustrates this point. In *Lue-Le*, the court held that an alien was deportable based on his Arizona conviction for possessing drug paraphernalia, even though Arizona's definition of a "drug" did not "map perfectly" with the Federal controlled substance definition. In reaching this conclusion the Ninth Circuit did not find it necessary to identify the *particular* controlled substance at issue, perhaps in recognition of the aforementioned distinction between crimes relating to the possession or distribution of a *particular* drug and more generalized crimes such as possession of drug paraphernalia.

As for the respondent's second argument—that *Matter of Martinez Espinoza* is "wholly inapplicable here"—the Court would simply record its disagreement. In his Motion to Reconsider the respondent points out that the alien in *Martinez Espinoza* was required to prove his admissibility, whereas in this case DHS must prove the respondent is removable as charged. This

Court is aware of the distinction between these burdens of proof. Nonetheless, the Court does not believe that this variation in procedural posture renders *Matter of Martinez Espinoza* irrelevant, especially insofar as it addresses a nearly identical provision of the Act and many of the same issues raised here.

Finally, with respect to the respondent's final argument—that the Court erred in applying a circumstance-specific approach to determine whether the respondent was convicted of "a single offense involving possession for one's own use of thirty grams or less of marijuana"—the Court will refer to its previous order. *See also Matter of Martinez Espinoza*, 25 I&N Dec. at 124 (determining that a "circumstance-specific" inquiry must be used to determine whether a drug offense involved thirty grams of less marijuana for one's own use for purposes of section 212(h)). The Court would also emphasize that the respondent did not bear the burden of showing that his crime related to thirty grams or less of marijuana; rather, the Court specifically found that documents *submitted by DHS* constituted "clear and convincing evidence that [his] offense did not involve the possession of thirty grams or less of marijuana."

For these reasons, the Court finds that the respondent's Motion to Reconsider has failed to identify "errors of law or fact in the previous order." *See* INA § 240(c)(6). In reaching this conclusion the Court renews and incorporates the findings of its order dated March 27, 2012, in conjunction with the additional observations set forth above.

Accordingly, after careful consideration, the following order is entered:

ORDER OF THE IMMIGRATION JUDGE

IT IS HEREBY ORDERED that the respondent's Motion to Reconsider is **DENIED.**

May 1, 2012

/s/John R. O'Malley
John R. O'Malley
United States Immigration Judge

[Certificate of Service Omitted in Printing of this Appendix]

* * *

APPENDIX E

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
2345 GRAND BOULEVARD, SUITE 525
KANSAS CITY, MISSOURI 64108

File No. A087-317-931

[Filed March 27, 2012]

IN THE MATTER OF	)
	)
Monnes MELLOULI	)
	)
RESPONDENT	)
	)

IN REMOVAL PROCCEEDINGS

CHARGE: Section 237(a)(2)(B)(i) of the Immigration and Nationality Act, as amended: Alien who at any time after admission has been convicted of any law or regulation relating to a controlled substance, other than a single offense involving possession for one's own use of thirty grams or less of marijuana.

APPLICATION: Contested Removal

ON BEHALF OF THE RESPONDENT:
Michael Sharma-Crawford, Esq.
Sharma-Crawford Attorneys at Law
515 Avenida Cesar E. Chavez
Kansas City, MO 64108

ON BEHALF OF THE GOVERNMENT:
Jayme Salinardi, Esq.
Immigration and Customs Enforcement
2345 Grand Boulevard, Suite 500
Kansas City, MO 64108

WRITTEN DECISION OF THE IMMIGRATION JUDGE

I. Procedural History

On July 13, 2010, the respondent was convicted of Possession of Drug Paraphernalia in violation of K.S.A. § 21-36a09 in Johnson County, Kansas. *See* Group Exhibit 2, Tab C. On February 17, 2012, the Department of Homeland Security (DHS) personally served the respondent with a Notice to Appear (NTA), charging him with being removable pursuant to section 237(a)(2)(B)(i) of the Immigration and Nationality Act, as amended (the Act). *See* Exhibit 1.

At a master calendar hearing held March 20, 2012, the respondent, through counsel, admitted to the factual allegations contained in the NTA but denied that his conviction for Possession of Drug Paraphernalia rendered him removable under section 237(a)(2)(B)(i). Specifically, he argued that his conviction record does not specify the controlled substance at issue, and that therefore the DHS has not shown that his conviction involved a controlled substance as defined in section 102 of the Controlled

Substances Act. For the reasons discussed below, the Court finds that the Department has established by clear and convincing evidence that the respondent was convicted of a crime encompassed by section 237(a)(2)(B)(i). *See* INA § 240(c)(3). Therefore, the removal charge will be sustained.

II. Analysis

Section 237(a)(2)(B)(i) of the Act provides that any alien who at any time after admission has been convicted of a violation of any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), other than a single offense involving possession for one's own use of thirty grams or less of marijuana, is deportable. In *Matter of Martinez Espinoza*, 25 I&N Dec. 118 (BIA 2009), the Board of Immigration Appeals (Board) maintained a broad reading of the phrase "relating to" and determined that an alien may be rendered inadmissible under section 212(a)(2)(A)(i)(II)—a provision that mirrors the language of section 237(a)(2)(B)(i)—on the basis of a conviction for possession or use of drug paraphernalia. There, the alien had argued that "a drug paraphernalia conviction cannot support a finding of inadmissibility unless the paraphernalia was tied to a specific, federally controlled substance." *Matter of Martinez Espinoza* at 121. In rejecting this argument, the Board pointed out that

> we have long drawn a distinction between crimes involving the possession or distribution of a *particular* drug and those involving other conduct associated with the drug trade in

> general. Thus, the requirement of a correspondence between the Federal and State controlled substance schedules, embraced by *Matter of Paulus* ... for cases involving the possession of particular substances, has never been extended to other contexts by the Board.

Id. The Board also cited approvingly to several circuit court decisions that adopt a similarly broad reading of the phrase "relating to." *See Desai v. Mukasey*, 520 F.3d 762, 764-65 (7th Cir. 2008) (holding that an Illinois conviction for the knowing distribution of a "look-alike" controlled substance was a violation of a State law "relating to a controlled substance," even though "look-alike" substances are not listed on the Federal controlled substance schedules); *Luu-Le v. INS*, 224 F.3d 911, 915 (9th Cir. 2000) (holding that an alien was deportable based on his Arizona conviction for possessing drug paraphernalia, even though Arizona's definition of a "drug" did not "map perfectly" with the Federal controlled substance definition).

Given the breadth of the Kansas drug paraphernalia statute, it is helpful to consult the respondent's record of conviction to identify the exact statutory subsection at issue. *See* K.S.A § 21-36a09 (transferred to K.S.A. § 21-5709). According to his Journal Entry of Judgment, the respondent pled guilty to Count 1 of the Amended Complaint. *See* Group Exhibit 2, pg. 10. This count alleges that the respondent "did ... unlawfully, knowingly, and wilfully use or possess with intent to use *drug paraphernalia* ... to store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body *a controlled substance* .... " *Id.* at 9 (emphasis added). This charge

tracks the language of subsection (b)(2) of the Kansas drug paraphernalia statute, making it clear the respondent was convicted under that subsection.

Turning to some of the relevant statutory definitions, K.S.A. § 21-5701(f) defines "drug paraphernalia" as

> all equipment and materials of any kind which are used, or primarily intended or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body a controlled substance.

Further, a "controlled substance" is defined by Kansas law as "any drug, substance or immediate precursor included in any of the schedules designated in K.S.A. 65-4105, 65-4107, 65-4109, 65-4111 and 65-4113, and amendments thereto." *See* K.S.A. § 21-5701(a). Notably, many of the controlled substances identified in the Kansas schedules are also covered by the federal schedules as printed in 21 U.S.C. § 812(c).

Upon consideration of the Board's decision in *Matter of Martinez Espinoza*, *supra*, as well as the other circuit decisions cited therein, the Court finds that the DHS has established by clear and convincing evidence that the respondent was convicted of a State law relating to a controlled substance. Even though the Kansas definition of "controlled substance" does not "map perfectly" the definition of that term as used in

section 102 of the Controlled Substances Act, the Kansas drug paraphernalia statute "is plainly intended to criminalize behavior involving the production or use of drugs." *Matter of Martinez Espinoza*, 25 I&N Dec. at 122 (quoting *Luu-Le v. INS*, 224 F.3d at 915). Moreover, similar to the Arizona statute addressed in *Luu-Le*, K.S.A. § 21-5711 sets forth sixteen factors that a court shall consider in determining whether an object is drug paraphernalia. These factors include statements by the owner or person in control of the object, the proximity of the object to drugs, the existence of any drug residue on the object, and direct or circumstantial evidence of the owner or user's intent and knowledge. *See* K.S.A. § 21-5711. Considered in its entirety, this statutory framework "makes abundantly clear that an object is not drug paraphernalia unless it is in some way linked to drugs." *Luu-Le v. INS*, *supra*.

The Court must next consider whether the respondent's conviction was an "offense involving possession for one's own use of thirty grams or less of marijuana." *See* INA § 237(a)(2)(B). In *Matter of Martinez Espinoza*, 25 I&N Dec. at 124, the Board addressed nearly identical language in section 212(h) of the Act and determined that "the term 'offense' ... refer[s] to the specific unlawful acts that made the alien inadmissible, rather than to any generic crime." Thus, a "circumstance-specific" inquiry must be used to determine whether a drug offense involved thirty grams of less marijuana for one's own use. *Id.* Unlike the modified categorical approach, such an inquiry permits an immigration judge to consult evidence outside the record of conviction. *See Nijhawan v. Holder*, 129 S. Ct. 2294, 2298 (2009).

Here, the Affidavit filed in the respondent's criminal case states that "deputies found four orange tablets in his sock .... The drugs had the inscription 'M Aphet Salts 30 mg' which is identified as Adderall." *See* Group Exhibit 2, pg. 8. The original complaint filed against the respondent also refers to Adderall. *See* Group Exhibit 3, pg. 22. The Court finds these documents to be clear and convincing evidence that the respondent's offense did not involve the possession of thirty grams or less of marijuana.

Based on the foregoing, the removal charge under section 237(a)(2)(B)(i) of the Act will be sustained. This matter has been scheduled for a master calendar reset hearing on April 3, 2012, at 10:30 am. The respondent should be prepared to identify what forms of relief, if any, he intends to pursue at that time.

Accordingly, after careful consideration, the following order is entered:

ORDER OF THE IMMIGRATION JUDGE

IT IS HEREBY ORDERED that the charge of removal under section 237(a)(2)(B)(i) is **SUSTAINED**.

March 27, 2012 /s/John R. O'Malley
John R. O'Malley
United States Immigration Judge

[Certificate of Service Omitted in Printing of this Appendix]

* * *

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 12-3093

[Filed October 28, 2013]

Moones Mellouli	)
	)
Petitioner	)
	)
v.	)
	)
Eric H. Holder, Jr., Attorney General of the United States	)
	)
Respondent	)

Petition for Review of an Order of the Board of Immigration Appeals (A087-317-931)

ORDER

The petition for rehearing *en banc* is denied. The petition for panel rehearing is also denied.

Judges Wollman, Murphy, Bye and Kelly would grant the petition for rehearing *en banc*.

October 28, 2013

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX G

STATUTES

8 U.S.C. § 1227. Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

* * *

(2) Criminal offenses

* * *

(B) Controlled substances

(i) Conviction

Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

* * *

21 U.S.C. § 802 - Definitions

* * *

(6) The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.

* * *

Kan. Stat. Ann. § 21-5701. Definitions

(a) "Controlled substance" means any drug, substance or immediate precursor included in any of the schedules designated in K.S.A. 65-4105, 65-4107, 65-4109, 65-4111 and 65-4113, and amendments thereto.

* * *

Kan. Stat. Ann. § 21-5709. Unlawful possession of certain drug precursors and drug paraphernalia

(a) It shall be unlawful for any person to possess ephedrine, pseudoephedrine, red phosphorus, lithium metal, sodium metal, iodine, anhydrous ammonia, pressurized ammonia or phenylpropanolamine, or their salts, isomers or salts of isomers with an intent to use the product to manufacture a controlled substance.

(b) It shall be unlawful for any person to use or possess with intent to use any drug paraphernalia to:

(1) Manufacture, cultivate, plant, propagate, harvest, test, analyze or distribute a controlled substance; or

(2) store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body.

(c) It shall be unlawful for any person to use or possess with intent to use anhydrous ammonia or pressurized ammonia in a container not approved for that chemical by the Kansas department of agriculture.

(d) It shall be unlawful for any person to purchase, receive or otherwise acquire at retail any compound, mixture or preparation containing more than 3.6 grams of pseudoephedrine base or ephedrine base in any single transaction or any compound, mixture or preparation containing more than nine grams of pseudoephedrine base or ephedrine base within any 30-day period.

(e)(1) Violation of subsection (a) is a drug severity level 3 felony;

(2) violation of subsection (b)(1) is a:

(A) Drug severity level 5 felony, except as provided in subsection (e)(2)(B); and

(B) class A nonperson misdemeanor if the drug paraphernalia was used to cultivate fewer than five marijuana plants;

(3) violation of subsection (b)(2) is a class A nonperson misdemeanor;

(4) violation of subsection (c) is a drug severity level 5 felony; and

(5) violation of subsection (d) is a class A nonperson misdemeanor.

(f) For persons arrested and charged under subsection (a) or (c), bail shall be at least $50,000 cash or surety, unless the court determines, on the record, that the defendant is not likely to reoffend, the court imposes pretrial supervision or the defendant agrees to participate in a licensed or certified drug treatment program.

OPPOSITION BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
MAY 14 2014
OFFICE OF THE CLERK

No. 13-1034

In the Supreme Court of the United States

MOONES MELLOULI, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

An alien previously admitted to the United States is generally removable under 8 U.S.C. 1227(a)(2)(B)(i) if he has been "convicted of a violation of * * * any law or regulation of a State * * * relating to a controlled substance (as defined in section 802 of title 21)."

The question presented is whether a violation of Kansas's statute prohibiting possession of drug paraphernalia is "a violation of * * * any law or regulation of a State * * * relating to a controlled substance (as defined in section 802 of title 21)." 8 U.S.C. 1227(a)(2)(B)(i).

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 6
Conclusion 18

TABLE OF AUTHORITIES

Cases:

Alvarez Acosta v. *United States Att'y Gen.*, 524 F.3d 1191 (11th Cir. 2008) 13
Bermudez v. *Holder*, 586 F.3d 1167 (9th Cir. 2009) 13
Castillo v. *Holder*, 539 Fed. Appx. 243 (4th Cir. 2013) 14
Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984) 5, 17
Desai v. *Mukasey*, 520 F.3d 762 (7th Cir. 2008) 6, 15
Estrada v. *Holder*, 560 F.3d 1039 (9th Cir. 2009) 13
Gonzales v. *Duenas-Alvarez*, 549 U.S. 183 (2007) 5, 9, 12
INS v. *Aguirre-Aguirre*, 526 U.S. 415 (1999) 7
Luu-Le v. *INS*, 224 F.3d 911 (9th Cir. 2000) 13
Martinez Espinoza, In re, 25 I. & N. Dec. 118 (B.I.A. 2009) 4, 7, 8, 16
Martinez-Gomez, In re, 14 I. & N. Dec. 104 (B.I.A. 1972) 8
Moncrieffe v. *Holder*, 133 S. Ct. 1678 (2013) 9, 12, 15, 16
Morales v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992) 7, 8
Paulus, In re, 11 I. & N. Dec. 274 (B.I.A. 1965) 6, 14
Rojas v. *Attorney Gen. of the United States*, 728 F.3d 203 (3d Cir. 2013) 14, 15, 17
Ruiz-Vidal v. *Gonzales*, 473 F.3d 1072 (9th Cir. 2007) 16

Case—Continued: Page

United States v. *Oseguera-Madrigal*, 700 F.3d 1196 (9th Cir. 2012) 13

Statutes and regulations:

Controlled Substances Act, 21 U.S.C. 801 *et seq.* 2
21 U.S.C. 802 2
21 U.S.C. 802(6) 2
21 U.S.C. 802(34)(C) 10
21 U.S.C. 802(34)(K) 10
21 U.S.C. 802(41)(A) 9
21 U.S.C. 812(d) (Sched. I(d)) 11
21 U.S.C. 812(c) (Sched. I(d)(2)(B)(iii)) 10
21 U.S.C. 812(c) (Sched. I(d)(2)(B)(iv)) 10
21 U.S.C. 812(c) (Sched. III(e)) 9
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 2
8 U.S.C. 1227(a)(2)(B)(i) 2, 3, 7, 12, 14
Kansas Stat. Ann.:
§ 21-36a01(a) (Supp. 2010) 3
§ 21-36a01(f) (Supp. 2010) 3
§ 21-36a09(b) (Supp. 2010) 3
§ 21-5701 (2013) 3
§ 21-5701(f) (2013) 3
§ 21-5709(b) (2013) 3
§ 65-4105(e)(3) (2014) 11
§ 65-4105(h)(2)-(8) (2014) 11
§ 65-4107(b)(2) (2014) 11
§ 65-4107(b)(3) (2014) 11
§ 65-4109(b)(13) (2014) 11
§ 65-4109(f)(12) (2014) 9

Statutes and regulations—Continued: Page

§ 65-4109(f)(14) (2014) 9
§ 65-4109(f)(23) (2014) 9
§ 65-4113(b)(1)-(5) (2014) 11
21 C.F.R.:
Section 1300.01 10
Section 1300.01(b) 9
Section 1308.11(e)(1) 11
Section 1308.12(b)(2) 11
Section 1308.12(b)(3) 11
Section 1308.13(c)(6) 11
Section 1308.13(f)(1) 9
Section 1308.15(c)(1)-(5) 11

Miscellaneous:

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Drug Abuse Handbook (Steven B. Karch ed., 2d ed. 2007) 10
56 Fed. Reg. 5753 (Feb. 13, 1991) 9
62 Fed. Reg. (Mar. 24, 1997):
p. 13,938 10
p. 13,941 10
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p. 12,938 11
pp. 12,942-12,943 11

Miscellaneous—Continued: Page

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Uniform Controlled Substances Act (amended 1994), 9 [Pt. II] U.L.A. 5 (2007) 4

Webster's Third New International Dictionary (1961) 6

In the Supreme Court of the United States

No. 13-1034

MOONES MELLOULI, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 719 F.3d 995. The decisions of the Board of Immigration Appeals (Pet. App. 17-19) and the immigration judge (Pet. App. 23-28, 29-35) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 15-16) was entered on July 9, 2013. A petition for rehearing was denied on October 28, 2013 (Pet. App. 36-37). On January 17, 2014, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including February 25, 2014, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that an alien is removable from the United States if he has been "convicted of a violation of * * * any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana." 8 U.S.C. 1227(a)(2)(B)(i). Section 802 of Title 21 of the United States Code defines "controlled substance" to refer to certain drugs, other substances, or precursors on schedules of controlled substances promulgated under the Controlled Substances Act, 21 U.S.C. 801 *et seq.* See 21 U.S.C. 802(6).

2. a. Petitioner is a native and citizen of Tunisia who was admitted to the United States in 2004 on a student visa. Pet. App. 2; Administrative Record (A.R.) 109. He became a conditional resident in 2009 and a lawful permanent resident in 2011. A.R. 109.

On April 4, 2010, while petitioner was detained on charges of driving under the influence of alcohol, jail officials discovered four orange tablets hidden in petitioner's sock. Pet. App. 5-6; A.R. 130. Petitioner admitted that the tablets were Adderall, which is a controlled substance under both federal law and Kansas law. Pet. App. 6; A.R. 130. Petitioner was charged with trafficking contraband in a jail in violation of Kansas law. Pet. App. 6.

Petitioner pleaded guilty to an amended complaint containing the lesser charge that he had possessed drug paraphernalia—specifically, a sock used to store a controlled substance. A.R. 131; Pet. App. 6. Kansas makes it unlawful "for any person to use or possess

with intent to use any drug paraphernalia to * * * store, contain, conceal, inject, ingest, inhale, or otherwise introduce a controlled substance into the human body." Kansas Stat. Ann. § 21-5709(b) (2013).[1] "Drug paraphernalia" includes "containers and other objects used or intended for use in storing or concealing controlled substances." *Id.* § 5701(f). "Controlled substance" is defined as any substance on Kansas's schedules of illegal drugs, precursors, and chemicals. *Id.* § 21-5701; see Pet. App. 7. Those schedules contain hundreds of substances that are controlled under federal law, and also list a handful of substances that are not federally controlled. *Id.* at 4. Following his guilty plea, petitioner was sentenced to twelve months of probation with a suspended jail term of 359 days. A.R. 157.

b. In 2012, the Department of Homeland Security (DHS) charged that petitioner was removable from the United States pursuant to 8 U.S.C. 1227(a)(2)(B)(i), based on his drug-paraphernalia conviction. Pet. App. 30. An immigration judge agreed, determining that DHS had established petitioner's removability by clear and convincing evidence by showing that petitioner had been convicted of violating Kansas's drug-paraphernalia statute. *Id.* at 29-35. The judge rejected petitioner's contention that his conviction did not trigger removability because it was not tied to a specific federally controlled substance. *Id.* at 31-35. The judge noted that the Board of Immigration Appeals (BIA) had concluded that crimes involving "conduct associated with the drug trade in

---

[1] At the time of petitioner's conviction, Kansas Stat. Ann. §§ 21-5701, 5701(f), and 5709(b) were codified at, respectively, Kansas Stat. Ann. §§ 21-36a01(a), 21-36a01(f), and 21-36a09(b) (Supp. 2010).

general" were crimes relating to controlled substances, even if conviction records did not establish a link to a particular federally controlled substance. *Id.* at 31-32 (quoting *In re Martinez Espinoza*, 25 I. & N. Dec. 118, 121 (B.I.A. 2009)).

The immigration judge concluded that Kansas's statute prohibiting the possession of items used in storing or consuming controlled substances was a statute of this type, even though Kansas's regulation of several non-federally controlled substances meant that "the Kansas definition of 'controlled substance' does not 'map perfectly' the definition of that term as used in section 102 of the [federal] Controlled Substances Act." Pet. App. 33-34. The judge denied reconsideration. *Id.* at 23-28.

The BIA dismissed petitioner's appeal, agreeing that petitioner's drug-paraphernalia conviction was a conviction for an offense relating to controlled substances under *Martinez Espinoza*. Pet. App. 17-19.

3. The court of appeals denied a petition for review. Pet. App. 1-14. The court began by observing that there was virtually no chance that a defendant would be convicted of a crime related to a substance that was controlled under Kansas law but not federal law. Kansas's controlled-substance statute was based on the Uniform Controlled Substances Act (UCSA), a model law drafted "to complement the federal law and provide an interlocking trellis of federal and state law to enable government at all levels to control more effectively the drug abuse problem." *Id.* at 3-4 (quoting UCSA (amended 1994), 9 [Pt. II] U.L.A. 5) (2007). The UCSA controlled the same substances as were then controlled under federal law. *Id.* at 4. Later, Kansas and some other States "added a small number

of substances not listed on the federal schedules" to their controlled-substance lists. *Ibid.* At the time of petitioner's conviction, however, "[o]f the hundreds of substances currently listed" on Kansas's schedules, "less than a handful" were not federally scheduled. *Ibid.* As a result, the court of appeals concluded that "there is little more than a 'theoretical possibility' that a conviction for a controlled substance offense under Kansas law will *not* involve a controlled substance as defined in 21 U.S.C. [Section] 802." *Id.* at 4-5 (quoting *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 193 (2007)).

The court of appeals rejected petitioner's claim that this "possibility, however remote, that a Kansas drug paraphernalia conviction [would] not involve use in connection with a federal controlled substance" meant that he had not violated a state law relating to federally controlled substances. Pet. App. 7. The court noted that the BIA had concluded that state statutes prohibiting the possession of drug paraphernalia were state laws relating to controlled substances, for removability purposes, even when a State's controlled-substance schedules included some substances that were not federally controlled. *Id.* at 10. The court explained that under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), it was required to defer to that interpretation so long as it was "neither arbitrary nor manifestly unreasonable." Pet. App. 10.

The court of appeals concluded that the BIA's interpretation was reasonable. The court explained that Congress's decision to make aliens removable when convicted of violating state laws relating to controlled substances signaled an intent "to broaden the reach of the removal provision to include state offenses having 'a logical or causal connection' to federal controlled

substances," even when the state laws in question did not regulate precisely the same substances as are controlled under federal law. Pet. App. 10 (quoting *Webster's Third New International Dictionary* 1916 (1961)). "'If Congress wanted a one-to-one correspondence between the state laws and the federal'" schedules, the court reasoned, '"it would have used a word like "involving" instead of "relating to."'" *Ibid.* (quoting *Desai* v. *Mukasey*, 520 F.3d 762, 766 (7th Cir. 2008)). At a minimum, the court decided, it was "reasonable for the BIA to conclude that any drug paraphernalia conviction in these States was, categorically, a violation of a law 'relating to a controlled substance' within the meaning of" the removability provision, given that there is "nearly a complete overlap between the definition of controlled substance in 21 U.S.C. [Section] 802 and in the statutes of States such as Kansas that adopted the Uniform Controlled Substances Act." *Ibid.*

The court of appeals also rejected petitioner's argument that the BIA's interpretation of the removability provision in the context of drug-paraphernalia statutes had arbitrarily ignored a prior BIA decision. Pet. App. 11 (discussing *In re Paulus*, 11 I. & N. Dec. 274, 276 (B.I.A. 1965)).

The court of appeals denied a petition for rehearing en banc, with four members of the court voting to grant rehearing. Pet. App. 36.

ARGUMENT

Petitioner seeks further review (Pet. 7-25) of the determination that he is removable because his drug-paraphernalia conviction was for a violation of a state law relating to federally controlled substances. The court of appeals correctly decided that petitioner was

removable on that ground, and its decision is consistent with the approaches of virtually every other court to consider the question. While there is tension between the decision below and a single recent Third Circuit case, there is not a mature conflict requiring this Court's intervention. Further review of this case is accordingly not warranted.

1. The court of appeals was correct that petitioner is removable from the United States because he violated a law relating to substances that are controlled under federal law. Pet. App. 9-14.

a. The BIA, which is entitled to deference concerning its construction of ambiguous terms in the INA, see *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999), has construed the phrase "any law or regulation of a State * * * relating to a controlled substance (as defined in section 802 of title 21)," 8 U.S.C. 1227(a)(2)(B)(i), to encompass state laws that prohibit possession of drug paraphernalia even when there is not a one-to-one correspondence between state and federal controlled substance schedules. See *In re Martinez Espinoza*, 25 I. & N. Dec. 118, 122 (2009).

The BIA's construction is reasonable. "The ordinary meaning" of the phrase "relating to" "is a broad one—to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with." *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (citation and internal quotation marks omitted). Given the "nearly * * * complete overlap" between controlled-substance schedules of the federal government and those of the States that adopted the UCSA, Pet. App. 10, state statutes prohibiting possession of tools intended for storing or consuming state-controlled sub-

stances "stand in some relation" to federally controlled substances, *Morales*, 504 U.S. at 383, because such state paraphernalia statutes prohibit possession of tools used to store or consume the hundreds of substances that are federally controlled.

This relationship is accentuated because drug paraphernalia need not be tied only to a single controlled substance. As the BIA has explained, drug-paraphernalia statutes can be seen as proscribing "conduct associated with the drug trade in general." *Martinez Espinoza*, 25 I. & N. Dec. at 121. The BIA has long treated statutes targeting that type of conduct as "relating to" federally controlled substances without requiring proof of a connection between the conduct and a particular federally controlled substance. Thus, as *Martinez Espinoza* noted, *In re Martinez-Gomez*, 14 I. & N. Dec. 104 (B.I.A. 1972), concluded "that an alien's California conviction for opening or maintaining a place for the purpose of unlawfully selling, giving away, or using any narcotic was a violation of a law relating to illicit traffic in narcotic drugs" under the INA, "even though the California statute required no showing that only *Federal* narcotic drugs were sold or used in the place maintained, because the 'primary purpose' of the law was 'to eliminate or control' traffic in narcotics." *Martinez Espinoza*, 25 I. & N. Dec. at 121. Particularly given the likelihood that items used to consume or store the few state-controlled substances that are not federally listed also could be used to serve the same function for substances that are federally controlled, it is reasonable for the BIA to treat prohibitions on drug paraphernalia as relating to federally controlled substances because they forbid possession of tools of the drug trade in general.

b. Even if the inclusion in a State's own controlled-substance schedules of substances that are not federally controlled had potential relevance, Kansas's listing of several additional substances would not render its statute overbroad. Even when a State's criminal statute must correspond to a generic federal definition in order to trigger a sentencing or immigration consequence, the necessary correspondence exists unless there is "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic [federal] definition" at issue. *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1684-1685 (2013) (quoting *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 193 (2007)); see Pet. App. 4-5.

As the court of appeals concluded, there is "little more than a 'theoretical possibility' that a conviction for a controlled substance offense under Kansas law will *not* involve a controlled substance as defined in 21 U.S.C. [Section] 802." Pet. App. 4-5 (citing *Duenas-Alvarez*, 549 U.S. at 193). While petitioner asserts (Pet. 3 n.1) that there were 12 substances out of more than 300 controlled under Kansas law at the time of his conviction that were not federally controlled, even that small number overstates the difference between the two jurisdictions' schedules. Three of the state-controlled substances on which petitioner relies (Methandranone, Methandrostenolone, and Stanolone) are anabolic steroids, see Kansas Stat. Ann. § 65-4109(f)(12), (14) and (23) (2014), which are also controlled under federal law. See 21 U.S.C. 802(41)(A), 812(c) (Sched. III(e)); 21 C.F.R. 1300.01(b), 1308.13(f)(1).[2] Two others

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[2] The Drug Enforcement Administration (DEA) has promulgated regulations specifically identifying certain substances as anabolic steroids. See 56 Fed. Reg. 5753 (Feb. 13, 1991). Two of the Kansas-

—ephedrine and pseudoephedrine—are federally controlled as "list I chemical[s]" that are used in the manufacture of federally controlled substances. 21 U.S.C. 802(34)(C) and (K). Thus, only seven of several hundred substances controlled under Kansas law at the time of petitioner's conviction were not also federally regulated under provisions that relate to federally controlled substances.[3] And two of those—"1-pentyl-3-(1-naphthoyl)indole" and "1-butyl-3-(1-naphthoyl) indole"—have since been added to the federal schedules. See 21 U.S.C. 812(c) (Sched. I(d)(2)(B)(iii) and (iv)).[4]

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controlled steroids that petitioner suggests were not federally controlled are in fact identified as federally controlled anabolic steroids in these regulations using alternative chemical names. See Nat'l Ctr. for Biotechnology Info., *Methandrostenolone*, http://pubchem.ncbi.nlm.nih.gov/summary/summary.cgi?cid=6300&loc=ec_rcs (last visited May 12, 2014) (identifying Methandrostenolone as synonym for the federally identified steroid Methandienone); Office of Diversion Control, DEA, *Lists of: Scheduling Actions, Controlled Substances, Regulated Chemicals* (Mar. 2014), http://www.deadiversion.usdoj.gov/schedules/orangebook/d_cs_drugcode.pdf (last visited May 12, 2014) (identifying Stanolone as synonym for federally identified steroid of 4-Dihydrotestosterone). The remaining substance identified as a controlled steroid under Kansas law, Methandranone, was identified as a controlled anabolic steroid under federal regulations for a time, see 62 Fed. Reg. 13,938, 13,941 (Mar. 24, 1997), but is no longer so identified. See 21 C.F.R. 1300.01. One treatise suggests that name was mistakenly included in the original list but is not in fact an existing steroid. See *Drug Abuse Handbook* 30 (Steven B. Karch ed., 2d ed. 2007).

[3] These are salvia divinorum; jimson weed; 1-(3-[trifluoromethylphenyl])piperazine (also known as TFMPP); butyl nitrite; propylhexedrine; 1-pentyl-3-(1-naphthoyl)indole and 1-butyl-3-(1-naphthoyl)indole. Pet. 3 n.1.

[4] Petitioner asserts (Pet. 3 n.1) that since his offense, Kansas has added nine substances to its controlled-substance schedules that

have not also been added to federal schedules. As an initial matter, petitioner's case would be an inappropriate vehicle for consideration of any discrepancy between federal and state controlled substance schedules arising after his conviction. But in any event, recent changes have not resulted in substantial discrepancies between the Kansas and federal controlled-substance schedules. Several of the substances added to Kansas's schedules without corresponding DEA identification numbers are in fact federally scheduled. See 21 C.F.R. 1308.11(e)(1) (scheduling substance appearing at Kansas Stat. Ann. § 65-4105(e)(3) (2014)); 21 C.F.R. 1308.12(b)(2) (scheduling substances named at Kansas Stat. Ann. § 65-4107(b)(2) (2014)); 21 C.F.R. 1308.12(b)(3) (scheduling substances named at Kansas Stat. Ann. § 65-4107(b)(3) (2014)); 21 C.F.R. 1308.13(c)(6) (scheduling substance named at Kansas Stat. Ann. § 65-4109(b)(13) (2014)); 21 C.F.R. 1308.15(c)(1)-(5) (scheduling substances named at Kansas Stat. Ann. § 65-4113(b)(1)-(5) (2014)).

Several other substances were added to Kansas's schedules as part of the State's efforts to control two classes of synthetic substances—"substituted cathinones" and "synthetic cannabinoids"—that have also been the focus of recent federal regulatory activity. See DEA, *2013 National Drug Threat Assessment Summary*, http://www.justice.gov/dea/resource-center/DIR-017-13%20NDTA%20Summary%20final.pdf at 14 (last visited May 13, 2014). Congress has enacted a ban on substances it defines as "cannabimimetic agents," see 21 U.S.C. 812(c) (Sched. I(d)), while Kansas has adopted a ban on "synthetic cannabinoids" that mirrors the approach of the National Conference of State Legislatures, see Kansas Stat. Ann. § 65-4105(h)(2)-(8) (2014). Similar developments have occurred with respect to "substituted cathinones." See National Conference of State Legislatures, *Substituted Cathinones Chemical Classes and Their Trade Names*, http://www.ncsl.org/research/civil-and-criminal-justice/substituted-cathinones-chemical-classes.aspx (last visited May 13, 2014) (describing state regulation of synthetic cathinones); 79 Fed. Reg. 12,938, 12,942-12,943 (Mar. 7, 2014) (instituting federal controls on ten synthetic cathinones). These developments illustrate that even state bans of non-federally controlled substances often address substances regulated under federal law using slightly different chemical definitions.

Petitioner has offered no reason to doubt the court of appeals' observation that a prosecution for one of the few comparatively esoteric substances listed only on Kansas's schedules is "little more than a 'theoretical possibility.'" Pet. App. 4 (quoting *Duenas-Alvarez*, 549 U.S. at 193). He has offered no evidence that Kansas has obtained a meaningful number of convictions—or brought any prosecutions at all—in cases involving those substances, let alone their associated paraphernalia. A search of Kansas cases not only reveals no such prosecutions but also reveals no mention of those substances. Under these circumstances, petitioner has not demonstrated a "realistic probability" that a Kansas paraphernalia conviction would involve one of the handful of substances listed on the State's schedules that are not also controlled under federal law. This would be fatal to petitioner's claim even if state drug-paraphernalia statutes were not related to federally controlled substances as a more general matter. See *Moncrieffe*, 133 S. Ct. at 1684-1685.

2. Petitioner contends (Pet. 7-18) that this Court should grant review to resolve a disagreement concerning whether state drug-paraphernalia laws categorically qualify as state laws relating to federally controlled substances, for purposes of determining an alien's removability.[5] While a recent decision of the

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[5] A similar claim is raised in *Madrigal-Barcenas* v. *Holder*, petition for cert. pending, No. 13-697 (filed Dec. 6, 2013). That case concerns whether a removable alien seeking cancellation of removal satisfies his burden of proving that he has not been convicted of a violation of any State "law or regulation * * * relating to a controlled substance (as defined in section 802 of title 21)," 8 U.S.C. 1227(a)(2)(B)(i), by noting that the record of his state drug-

Third Circuit regarding a Pennsylvania drug-paraphernalia law is in tension with the decision of the court of appeals in this case, addressing Kansas's drug-paraphernalia statute, this Court's review would be premature, because the conflict may be illusory in practice and because the BIA has not had the opportunity to address aspects of BIA precedent that led the Third Circuit to find deference to the BIA's approach unwarranted.

a. Most of the courts of appeals that have considered the question have concluded that the government establishes under 8 U.S.C. 1227(a)(2)(B)(i) that an alien has been convicted of violating the law of "a State * * * relating to a controlled substance (as defined in section 802 of title 21)" by establishing that the defendant was convicted of violating a drug-paraphernalia statute even if that State's controlled-substance schedules include substances not controlled under federal law. The Eleventh Circuit, see *Alvarez Acosta* v. *United States Att'y Gen.*, 524 F.3d 1191, 1196-1197 (2008), and the Ninth Circuit, see *United States* v. *Oseguera-Madrigal*, 700 F.3d 1196, 1198-1199 (2012); *Bermudez* v. *Holder*, 586 F.3d 1167, 1168-1169 (2009); *Estrada* v. *Holder*, 560 F.3d 1039, 1042 (2009); *Luu-Le* v. *INS*, 224 F.3d 911, 915-916 (2000), have both held, like the court of appeals in this case, that the government established removability through proof of such a state conviction. The Fourth Circuit has agreed in an unpublished opinion. *Castillo* v. *Holder*, 539 Fed. Appx. 243 (2013) (available at 2013 WL 5075590).

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paraphernalia conviction did not disclose that his conviction involved a federally controlled substance.

In contrast, the Third Circuit recently held that the government failed to establish that a lawful permanent resident was removable based on his conviction for violating Pennsylvania's drug-paraphernalia statute, where the State's controlled-substance schedules included some substances that were not federally controlled. *Rojas* v. *Attorney Gen. of the United States*, 728 F.3d 203 (2013) (en banc). The Third Circuit interpreted the provision rendering removable an alien convicted of violating "any *law* * * * relating to a [federally] controlled substance," 8 U.S.C. 1227(a)(2)(B)(i) (emphasis added), as making removable only individuals whose *convictions* were directly tied to a federally controlled substance. *Rojas*, 728 F.3d at 209 (concluding that immigration authorities "must show that 'a controlled substance' included in the definition of substances in section 802 of Title 21 was involved in the crime of conviction at issue"). That circuit declined to defer to the interpretation of Section 1227(a)(2)(B)(i) adopted by the BIA in *Martinez Espinoza* on several grounds. First, the court suggested that *Martinez Espinoza* was not controlling because it arose in a context in which the alien bore the burden of proving he had *not* been convicted of a controlled-substance offense. See *Rojas*, 728 F.3d at 211 (stating that this difference "alone factually and legally distinguish[es] *[Martinez] Espinoza*"). Second, the court suggested that *Martinez Espinoza* had ignored a BIA precedent that treated drug-possession crimes as triggering removability under the INA only when the substance involved was federally controlled. *Id.* at 210 (discussing *In re Paulus*, 11 I. & N. Dec. 274, 275 (B.I.A. 1965)). It suggested that the statutory text did not support a distinction between drug-

possession and drug-paraphernalia crimes. *Ibid.* The Third Circuit did not address in its analysis whether there was a realistic probability that a Pennsylvania defendant would be prosecuted for possessing paraphernalia not linked to a federally controlled substance. Cf. *Moncrieffe*, 133 S. Ct. at 1684-1685.

Petitioner suggests (Pet. 12-13) that the Seventh Circuit adopted the approach of the Third Circuit to drug-paraphernalia convictions in a case involving "look-alike" drugs. He is mistaken. In *Desai* v. *Mukasey*, 520 F.3d 762 (7th Cir. 2008), the court ruled that an alien was inadmissible as a result of his state conviction for unlawful delivery of a substance represented to contain the hallucinogen Psilocybin (or "shrooms"), in violation of an Illinois statute prohibiting "unlawful delivery of a look-alike substance." Although the actual substance that the alien delivered was not federally controlled, the court concluded that the conviction was for a crime "relating to a controlled substance." It emphasized the "broadening effect" of the term "relating to" in the INA, and concluded that the crime at issue had "enough" of a relation to a federally controlled substance to be a law "relating to a federal controlled substance." *Id.* at 766. In a portion of the opinion on which petitioner places great weight, the court added that the "look-alike" statute at issue was properly distinguished from a state statute that "outlaw[ed] the distribution of jelly beans"—a hypothetical crime that the court observed would not constitute a controlled-substance offense. *Ibid.*

Desai does not establish that the Seventh Circuit would decline to treat drug-paraphernalia convictions as controlled-substance offenses. As noted above, *Desai* recognized that, as a result of the INA's refer-

ence to statutes "relating to" a federally controlled substance, the relevant INA provision covers some statutes that do not themselves exclusively prohibit federally controlled substances. And the court of appeals' aside that a state law prohibiting jelly beans would not be a controlled-substance offense sheds little light on state paraphernalia crimes, because a statute banning jelly beans—unlike a statute banning drug paraphernalia—is wholly unconnected to the trade in federally controlled substances. Indeed, some courts that treat state drug-paraphernalia offenses as crimes relating to federally controlled substances have still held that state statutes prohibiting possession of non-federally controlled substances (like the hypothesized jelly-bean statute) do not categorically trigger removability. See *Ruiz-Vidal* v. *Gonzales*, 473 F.3d 1072 (9th Cir. 2007); *Martinez Espinoza*, 25 I. & N. Dec. at 121-122 (distinguishing between possession of particular substances and conduct associated with drug trade in general).

b. Consideration by this Court of the conflict suggested by the *Rojas* decision would be premature. While *Rojas* concluded that a state drug-paraphernalia statute was not a state law relating to a federally controlled substance, it did so without addressing whether there was a realistic probability of prosecution under the state statute at issue for conduct associated solely with non-federally controlled drugs. This Court, however, has emphasized in recent decisions that state statutes are not overbroad with respect to a federal definition unless there is a realistic probability of prosecution for conduct not covered by the applicable federal definition. See *Moncrieffe*, 133 S. Ct. at 1684-1685. And, as the analysis of the court of appeals

in this case indicates, there is good reason to believe that there is "little more than a 'theoretical possibility'" of prosecution under many state controlled-substance statutes for crimes involving substances that are not also federally controlled, given the "nearly * * * complete overlap" of state and federal schedules in the "interlocking trellis of federal and state law." Pet. App. 4, 9, 10. The rule adopted by courts other than the Third Circuit regarding paraphernalia offenses may thus be justified on grounds not yet considered by that court. And at a minimum, the Third Circuit's decision in *Rojas* casts no doubt on the court of appeals' analysis here of the minimal likelihood of a prosecution under *Kansas's* drug-paraphernalia statute for a violation not tied to federally controlled substances. Accordingly, review of the disagreement that petitioner identifies would be premature.

Similarly, the BIA has not had the opportunity to address the suggestion in *Rojas* that the BIA's interpretation of the relevant removability provision does not warrant deference because it conflicts with an earlier BIA decision. *Rojas* did not squarely address an argument of deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), because it concluded that its own "proposed reading of the statute has been accepted by the BIA" in *Paulus* and subsequently ignored by the BIA. *Rojas*, 728 F.3d at 210. The BIA has not had the opportunity to address *Rojas's* reading of the BIA's own precedents. It could do so in a manner that eliminates any conflict on this issue—for instance, by adopting the Third Circuit's analysis in *Rojas*. Or it could address *Rojas*'s claim of an internal conflict in the BIA's jurisprudence in a manner that

justifies reconsideration of *Rojas*—for instance, by disapproving *Paulus* or providing an explanation for the distinction between possessory and nonpossessory drug offenses that the *Rojas* court found absent from the BIA's prior decisions. Because, for the reasons above, the recent disagreement between the Third Circuit and other courts of appeals may prove short-lived, this Court's review would be premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY BRIEF

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In the Supreme Court of the United States

MOONES MELLOULI,
Petitioner,

v.

ERIC H. HOLDER, JR., Attorney General,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR THE PETITIONER 1

ARGUMENT 1

I. The circuit conflict is intractable and the question of Section 1227(a)(2)(B)(i) is ripe for review. 1

II. The realistic probability analysis does not apply. 5

A. This Court must first interpret the scope of the INA's controlled substance provision—only then can the agency determine whether the Kansas paraphernalia statute is overbroad. 6

B. That a state would enforce its laws as written requires no legal imagination. 7

III. The government's reliance on *Chevron* is improper because Section 1227(a)(2)(B)(i) is unambiguous. 10

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Alaka v. Att'y Gen.,
456 F.3d 88 (3d Cir. 2006) 2

Bautista v. Att'y Gen.,
744 F.3d 54 (3d Cir. 2012) 10

Chevron, U.S.A., Inc. v. NRDC, Inc.,
467 U.S. 837 (1984) 10, 11

Crawford v. Washington,
541 U.S. 36 (2004) 2

Desai v. Mukasey,
520 F.3d 762 (7th Cir. 2008) 4

Gonzales v. Duenas-Alvarez,
549 U.S. 183 (2007) 5, 8, 9

In re Alejandro Diego-Carreras,
A070 119 531, 2014 WL 347685 (B.I.A. Jan. 9, 2014) 4, 5

Jean-Louis v. Att'y Gen.,
582 F.3d 462 (3d Cir. 2009) 8

Knutsen v. Gonzales,
429 F.3d 733 (7th Cir. 2005) 2

Lopez v. Gonzales,
549 U.S. 47 (2006) 4, 11

Madrigal-Barcenas v. Holder,
No. 13-697 (filed Dec. 6, 2013) 2, 3

Matter of Martinez Espinoza,
25 I. & N. Dec. 118 (B.I.A. 2009) 4, 11, 12

Matter of Paulus,
11 I. & N. Dec. 274 (B.I.A. 1965) 4

McCullough v. State,
970 N.E.2d 795 *on reh'g*, 979 N.E.2d 1070 (Ind. Ct. App. 2012) *trans. denied*, 984 N.E.2d 221 (Ind. 2013). 9

Mellouli v. Holder,
719 F.3d 995 (8th Cir. 2013) 7

Mendieta-Robles v. Gonzales,
226 Fed. App'x 564 (6th Cir. 2007) 9

Miranda v. Arizona,
384 U.S. 436 (1966) 2

Missouri v. Frye,
132 S. Ct. 1399 (2012) 10

Moncrieffe v. Holder,
133 S. Ct. 1678 (2013) 3, 6, 8

Nijhawan v. Holder,
557 U.S. 29 (2009) 2

Ramos v. Att'y Gen.,
709 F.3d 1066 (11th Cir. 2013) 8

Rojas v. Attorney General,
728 F.3d 203 (3d Cir. 2013) 1, 2, 3, 4, 11

State v. Campbell,
106 P.3d 1129 (Kan. 2005) 8

State v. Snellings,
273 P.3d 739 (Kan. 2012) 8

United States v. Grisel,
488 F.3d 844 (9th Cir. 2007) . 8

STATUTES

8 U.S.C. § 1101(a)(43)(B) 11

8 U.S.C. § 1182(a)(2)(C)(i) 8

8 U.S.C. § 1227 11

8 U.S.C. § 1227(a)(2)(B)(i) *passim*

8 U.S.C. § 1229b(b)(1)(C) 3

21 U.S.C. § 802 12

21 U.S.C. § 802(6) 7, 8

21 U.S.C. § 802(33) 8

OTHER AUTHORITIES

Adding Certain Hallucinogenics as Controlled Substances, 44 The Verdict 9-10 (Summer 2008), *available at* http://www.kmja.org/wp-content/uploads/2010/09/VerdictSummer2008.pdf. 9

Joe Blumberg, *Salvia Case Tests Court System*, News-Press & Gazette, May 18, 2012, http://www.newspressnow.com/news/article_2556dc51-4ae8-5dbe-b685-37d109fb3d51.html?mode=jqm (Missouri) 9

Michael O'Neal, *2008 Legislative Changes of Interest to County and District Attorneys*, 5 The Kan. Prosecutor 1 (Summer/Fall 2008), *available at* http://www.kcdaa.org/Resources/Documents/KSProsecutor-Fall08.pdf. 9

Bill Reid, *Two Additions to List of Schedule I Substances*, 10 KCJIS News 1 (May 2008), *available at* http://www.accesskansas.org/kbi/info/docs/pdf/KN200805.pdf. 9

REPLY BRIEF FOR THE PETITIONER

This Court should resolve the intractable 4-2 circuit split on the construction of 8 U.S.C. § 1227(a)(2)(B)(i), which is illustrated by the Third Circuit's *en banc* decision and the Eighth Circuit's decision in this case. The government's two grounds of opposition to certiorari are not persuasive. First, this Court should not assume that States, like Kansas, will not enforce their drug laws as enacted by their legislatures. Deportation for drug paraphernalia not related to a federally listed drug is a real possibility, not just speculation. Second, the Board of Immigration Appeals (BIA) is not entitled to deference in interpreting 8 U.S.C. § 1227(a)(2)(B)(i) because the government has never shown how the statute is ambiguous.

ARGUMENT

I. The circuit conflict is intractable and the question of Section 1227(a)(2)(B)(i) is ripe for review.

The Third Circuit held by a 12-2 vote in *Rojas v. Attorney General*, 728 F.3d 203 (3d Cir. 2013) (en banc) that, to establish removability, the government must show that a state paraphernalia conviction involved a federally controlled substance. In contrast, the Eighth Circuit held that the BIA reasonably concluded that "any drug paraphernalia conviction" – including Mellouli's conviction for possessing a sock – categorically violated a law relating to a controlled substance even absent evidence from the government

that the drug involved was federally controlled.[1] *See* Pet. App. 10. *Rojas* expressly declined to follow the Eighth Circuit's approach, *see* 728 F.3d at 219 n.18, and the government has acknowledged the "disagreement among the courts of appeal," *see* BIO 10, *Madrigal-Barcenas v. Holder*, No. 13-697 (filed Dec. 6,

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[1] The government submitted the original complaint with the probable cause affidavit, the amended complaint, plea agreement on the amended charge, sentencing document, but no plea colloquy. A.R. 150-58. The government asserts that Petitioner admitted he possessed Adderall. BIO 2. This statement misconstrues the record. The government relies on double hearsay in a probable cause affidavit tied to a charge to which Petitioner did not plead. A.R. 130, 150-52. In the affidavit, a sergeant recounts the alleged contents of police reports. *Id.* Petitioner pled guilty only to the amended possession of paraphernalia complaint with no reference to the substance involved. Consequently, neither the statements of the sergeant nor those of the unnamed officers were tested for reliability. *See Crawford v. Washington*, 541 U.S. 36 (2004). Likewise, any constitutional infirmities associated with the alleged statement remain unknown. *See Miranda v. Arizona*, 384 U.S. 436 (1966). This Court has made clear that even where a court may consider documents outside the record of conviction, those documents "must meet a 'clear and convincing' standard" and "must 'be tied to the specific counts covered by the conviction.'" *Nijhawan v. Holder*, 557 U.S. 29, 42 (2009) (citing with approval the holdings in *Alaka v. Att'y Gen.*, 456 F.3d 88, 107 (3d Cir. 2006), that the "loss amount must be tethered to [the] offense of conviction [not based] on acquitted or dismissed counts," and *Knutsen v. Gonzales*, 429 F.3d 733, 739–740 (7th Cir. 2005), for the same). The contents of the probable cause affidavit fail both requirements. The alleged admission is not a proven fact. The record establishes only that Petitioner possessed a sock and that the sock was associated with a controlled substance under Kansas law.

2013).[2] The conflict is not mere "tension," as the government would have it now. *Compare* BIO 13 *with* BIO 10, *Madrigal-Barcenas*, No. 13-697. The decisions in Petitioner's case and *Rojas* represent contradictory interpretations of the same statute involving the same set of circumstances. Consequently, a noncitizen can be ordered removed in one circuit based on evidence that would be insufficient for removal in another.[3] The circuit split is intractable and intolerable.

The Third Circuit is unlikely to resolve the conflict by reversing course in a new *en banc* decision and adopting the government's "realistic probability" argument as the government suggests. Indeed, the full court rejected the notion that Pennsylvania's state schedule was sufficiently "close to" the federal schedule to obviate any inquiry into whether the substance itself is federally controlled—an argument akin to the government's assertion that there is no realistic probability of prosecution for paraphernalia tied to a substance controlled only by the state. *Rojas*, 728 F.3d at 213, 213 n.8.

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[2] The Court has scheduled the petition in *Madrigal-Barcenas*, No. 13-697, for conference on May 29, 2014. If the Court grants certiorari in *Madrigal-Barcenas*, Petitioner requests that the Court defer the disposition of this Petition until *Madrigal-Barcenas* is resolved on the merits.

[3] Because eligibility for cancellation of removal also turns on a "conviction" for a controlled substance, 8 U.S.C. § 1229b(b)(1)(C), a conviction for paraphernalia possession may preclude eligibility for relief in one circuit and not another. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1685, 1685 n.4 (2013).

The Eighth Circuit's decision also conflicts with the Seventh Circuit. *Desai v. Mukasey*, 520 F.3d 762, 766 (7th Cir. 2008), held that the court's "task is simply to examine whether the state law is one relating to a federal controlled substance," not to determine whether the state law addresses conduct associated with the drug trade in general. *Desai* rejected the claim that the "related to" language could expand the list of controlled substances beyond those listed in the Controlled Substances Act (CSA) but agreed that the term could expand the types of *conduct* justifying removal. *Id.* Based on *Desai*, a state's ban on distributing "look-alike" substances could be conduct "related to" a federally controlled substance. But a state's criminalization of non-federally controlled substances would have no effect on immigration status when a state-banned substance is not a CSA controlled substance. *Id.* Echoing *Lopez v. Gonzales*, 549 U.S. 47 (2006), *Desai* emphasized that Congress did "not give states free rein to define their criminal laws in a manner that would allow them to effectively usurp the federal government's authority to determine who is permitted to enter and live in this country." 520 F.3d at 766.

The government appears to recognize that *Matter of Martinez Espinoza*, 25 I. & N. Dec. 118, 122 (B.I.A. 2009), and *Matter of Paulus*, 11 I. & N. Dec. 274 (B.I.A. 1965), conflict, BIO 14, but asks the Court to delay review so that the Board can decide whether to resolve the conflict. The government offers no reason to suspect that the BIA would repudiate its position, and in the eight months since *Rojas*'s *en banc* decision the Board has not changed its view. *See In re Alejandro*

Diego-Carreras, A070 119 531, 2014 WL 347685 (B.I.A. Jan. 9, 2014).

Courts of appeals have disagreed over whether a drug conviction must relate to a federally controlled substance to support removability. Tens of thousands of noncitizens are removed annually for offenses related to controlled substances. There is no good reason to delay resolution of this intractable disagreement. The conflict over interpretation of an important statutory provision governing this nation's immigration laws is ripe.

II. The realistic probability analysis does not apply.

The government relies on this Court's statement in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007), that a statute is categorically overbroad only when there is a "realistic probability" it would be applied to conduct not reached by the Immigration and Nationality Act (INA). BIO 9. It then asserts that Section 1227(a)(2)(B)(i) does not require proof of a federally controlled substance for a paraphernalia offense because there is no realistic probability that an individual would be prosecuted for a non-federally controlled substance. BIO 9-12. This is backwards under the categorical approach and inappropriate as applied to Kansas law.

A. This Court must first interpret the scope of the INA's controlled substance provision—only then can the agency determine whether the Kansas paraphernalia statute is overbroad.

Section 1227(a)(2)(B)(i) refers to a conviction for a violation of state law. The categorical approach requires comparing a state crime of conviction to the relevant INA provision to determine if the minimum conduct necessary for conviction under the state statute matches the requirements of the federal provision. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684-85 (2013). To perform this matching analysis, a court must know the requirements of the federal provision. The circuit courts, however, are split on what requirements are in Section 1227(a)(2)(B)(i), and that is the question before this Court.

Once the federal requirements are identified, an agency fact finder can then identify the crime of conviction and determine whether that crime encompasses conduct not reached by the federal provision—an inquiry that involves asking whether there is a realistic probability that the state statute would reach conduct outside the scope of the federal one. *See id.* But the question of whether there is a realistic probability of a state statute's overbreadth has no place in determining the requirements of the INA provision.

Employing the same flawed analysis the government asserts here, the Eighth Circuit determined that the controlled substance ground of removability in the INA does not require the conviction to be tied to a federally controlled substance because

there was no realistic probability that a state conviction would not be tied to a federal substance. *Mellouli v. Holder*, 719 F.3d 995, 1000 (8th Cir. 2013). Under this interpretation, a Kansas paraphernalia possession conviction is a categorical match with the INA regardless of the substance involved and it is irrelevant whether the Kansas statute is divisible by substance and whether the record of conviction established that substance.

To resolve the circuit split, the Court must first determine what the text of Section 1227(a)(2)(B)(i) requires—an analysis in which the realistic probability of a state statute's reach plays no part. Only once the scope of the INA provision is clear can the agency determine whether the minimum conduct necessary for Petitioner's crime of conviction is a categorical match with the INA. That determination requires analysis of the elements of the Kansas law and its related divisibility—questions which the Eighth Circuit eluded due to its atextual reading of the statute and its improper use of this Court's "realistic probability" qualification.

B. That a state would enforce its laws as written requires no legal imagination.

The government agrees that seven substances appeared on Kansas's list of controlled substances that did not appear on the federal government's list at the time of Petitioner's conviction. BIO 10.[4] Thus Kansas'

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[4] The government incorrectly treats federally listed chemicals as synonymous with federally controlled substances to dismiss the divergence between the Kansas and federal schedules in their treatment of pseudoephedrine and ephedrine. *Compare* 21 U.S.C.

list of controlled substances was broader than the federal schedule when Petitioner was convicted of a Kansas paraphernalia offense.

Where a state statute explicitly proscribes conduct that falls outside the scope of the INA, no "legal imagination" is required to demonstrate the statute's overbreadth. *Cf. Moncrieffe*, 133 S. Ct. at 1684-85. Numerous circuit courts agree that the realistic probability question is inappropriate in this circumstance. *See, e.g., Ramos v. Att'y Gen.*, 709 F.3d 1066, 1071-72 (11th Cir. 2013) ("*Duenas-Alvarez* does not require this showing when the statutory language itself creates the 'realistic probability' that a state would apply the statute to conduct beyond the generic definition."); *Jean-Louis v. Att'y Gen.*, 582 F.3d 462, 481 (3d Cir. 2009) (finding no "application of 'legal imagination' to the Pennsylvania simple assault statute" necessary because the "elements . . . are clear, and the ability of the government to prosecute a defendant . . . is not disputed."); *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc) ("Where, as here, a state statute explicitly defines a crime more broadly than the generic definition, no 'legal imagination,' is required to hold that a realistic probability exists that the state will apply its statute to

---

§ 802(6) ("controlled substance") *with* 21 U.S.C. § 802(33) ("listed chemical"). Congress used these terms with precision in the INA. *Compare* 8 U.S.C. § 1182(a)(2)(C)(i) (illicit traffickers in "any controlled substance or in any listed chemical" as inadmissible) *with* 8 U.S.C. § 1227(a)(2)(B)(i) (those convicted of a law relating to a "controlled substance" as removable). Kansas prosecutes pseudoephedrine possession, a listed chemical but not a CSA controlled substance. *See State v. Snellings*, 273 P.3d 739 (Kan. 2012); *State v. Campbell*, 106 P.3d 1129 (Kan. 2005).

conduct that falls outside the generic definition of the crime." (citation omitted)); *Mendieta-Robles v. Gonzales*, 226 Fed. App'x 564, 572-73 (6th Cir. 2007) (rejecting application of *Duenas-Alvarez* because the statute's "clear language expressly and unequivocally" included conduct outside the generic definition's scope).

Kansas prosecutors, judges, and law enforcement associations hardly ignore additions to the state schedules of substances. *See* Michael O'Neal, *2008 Legislative Changes of Interest to County and District Attorneys*, 5 The Kan. Prosecutor 1, 6 (Summer/Fall 2008);[5] *Adding Certain Hallucinogenics as Controlled Substances*, 44 The Verdict 9-10 (Summer 2008);[6] Bill Reid, *Two Additions to List of Schedule I Substances*, 10 KCJIS News 1, 5 (May 2008) (discussing recent addition of jimson weed to the Kansas schedules).[7] The government urges the Court to assume Kansas will not enforce its laws – even recent additions including

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[5] Available at http://www.kcdaa.org/Resources/Documents/KSProsecutor-Fall08.pdf.

[6] Available at http://www.kmja.org/wp-content/uploads/2010/09/VerdictSummer2008.pdf.

[7] Available at http://www.accesskansas.org/kbi/info/docs/pdf/KN200805.pdf. Other states that have added non-federally listed salvia to their controlled substance schedules prosecute its possession. *See McCullough v. State*, 970 N.E.2d 795 *on reh'g*, 979 N.E.2d 1070 (Ind. Ct. App. 2012) *trans. denied*, 984 N.E.2d 221 (Ind. 2013); Joe Blumberg, *Salvia Case Tests Court System*, News-Press & Gazette, May 18, 2012, http://www.newspressnow.com/news/article_2556dc51-4ae8-5dbe-b685-37d109fb3d51.html?mode=jqm (Missouri).

Jimson weed – unless the noncitizen can show through prosecutions for substances controlled only by the state that Kansas law really does apply to the conduct to which it says it applies. Given the high percentage of charges resolved through plea agreements and the resulting limitations in searchable databases of cases, this requirement is not only misplaced but also unfair. *See Missouri v. Frye*, 132 S. Ct. 1399, 1402 (2012) (stating that 97% of federal convictions and 94% of state convictions are the result of guilty pleas).

III. The government's reliance on *Chevron* is improper because Section 1227(a)(2)(B)(i) is unambiguous.

A dispute over a statute's proper interpretation does not establish the ambiguity necessary to invoke *Chevron* deference. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842 n.9 (1984) ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."); *see also Bautista v. Att'y Gen.*, 744 F.3d 54, 58 (3d Cir. 2012) ("[N]ot every difficult question of statutory construction amounts to a statutory gap for a federal agency to fill . . . To conclude otherwise would be to find that every time there is a disagreement about statutory construction, we accord deference to agencies."). Rather, ambiguity occurs when Congress failed to speak directly on the disputed question. Though the government states that the Third Circuit did not "squarely address an argument of deference under *Chevron*," BIO 17, that court's opinion indicates otherwise. The Third Circuit considered whether to review the BIA's unpublished decision *de*

novo or under *Chevron* and determined that it need not decide the question because the result was the same under either standard, relying on a textual analysis of Section 1227(a)(2)(B)(i). *Rojas*, 728 F.3d at 207-14. The Third Circuit's reading of the statute is the only one consistent with the statutory text and requires the government to "show that the conviction for which it seeks to remove a foreign national involved or was related to a federally controlled substance." *Id.* at 205; *see also id.* at 209 (employing the rule of the last antecedent and rejecting a result that "would violate the cardinal principle that we do not cripple statutes by rendering words therein superfluous").

Congress, by importing no fewer than five schedules of substances into Section 1227, "pegged the immigration statutes to the classifications Congress itself chose." *Lopez*, 549 U.S. at 58. By specifically citing its own list of substances in Section 1227(a)(2)(B)(i), "Congress took the trouble to incorporate its own statutory scheme of" offenses, an approach that it could not have meant for courts to ignore whenever a State's scheme diverged. *Id.* (rejecting government's interpretation of 8 U.S.C. § 1101(a)(43)(B) that supplanted Congress's classifications with the States' as "passing strange").

Just as the Third Circuit relied on the statute's plain meaning, so too does the Board. In *Martinez Espinoza*, the Board used the phrase "relating to" to support its inconsistent distinction between offenses "involving the possession or distribution of a *particular* drug and those involving other conduct associated with the drug trade in general" to require proof of a federally controlled substance for convictions of the former but

not the latter. 25 I. & N. Dec. at 121. Although the decisions conflict, neither rests on textual ambiguity.

The government claims the relationship between state paraphernalia statutes and federal controlled substances is "accentuated because drug paraphernalia need not be tied only to a single controlled substance." BIO 8. Simply because the paraphernalia could be tied to multiple substances does not eliminate the textual requirement that at least one substance be one Congress references in Section 1227(a)(2)(B)(i), that is, a substance defined in Section 802 of the Title 21. Here, the government submitted evidence that Petitioner pled guilty to possessing a sock used in connection with a substance controlled by Kansas and no more. A.R. 151-58. The Eighth Circuit said that the evidence was sufficient to remove Petitioner from the United States. The statutory text does not permit this result.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 29, 2014

JOINT APPENDIX

Supreme Court, U.S.
FILED
SEP 17 2014
OFFICE OF THE CLERK

No. 13-1034

In the Supreme Court of the United States

MOONES MELLOULI,

Petitioner,

v.

ERIC H. HOLDER, JR., Attorney General,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

JOINT APPENDIX

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September 17, 2014

Petition for Writ of Certiorari filed February 25, 2014
Petition for Writ of Certiorari granted June 30, 2014

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TABLE OF CONTENTS

Relevant Docket Entries Board of Immigration Appeals, Certified Administrative Record, A87-317-931, *Moones Mellouli v. Holder* JA 1

Relevant Docket Entries United States Court of Appeals for the Eighth Circuit, No. 12-3093, *Moones Mellouli v. Eric H. Holder, Jr.* JA 3

Certified Administrative Record

NTA Exhibit #1:

U.S. Department of Homeland Security Notice to Appear, File No. A087 317 931 (February 17, 2012) JA 6

Bond Exhibit #2, Tab A:

Respondent's Criminal History Chart (March 6, 2012) JA 14

Bond Exhibit #2, Tab C [excerpt pages]:

Affidavit of Sgt. G. Shelton, Case No. 10CR847 (April 5, 2010) JA 17

Bond Exhibit #3, Department's Proposed Exhibit, Tab F [excerpt pages]:

Complaint, Case No. 10CR847 (April 5, 2010) JA 19

Initiation of Action, Case No. 10CR847 (April 5, 2010) JA 21

Amended Complaint, Case No. 10CR847 (July 13, 2010) JA 23

Plea Agreement, Case No. 10CR847 (July 13, 2010) JA 25

2009 Kansas Sentencing Guidelines Journal Entry of Judgment, Case No. 10CR847 (July 13, 2010) JA 27

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

Appendix A Opinion/Judgment, United States Court of Appeals for the Eighth Circuit (July 9, 2013) . App. 1

Appendix B Decision of the Board of Immigration Appeals, United States Department of Justice, Executive Office for Immigration Review (August 7, 2012) App. 17

Appendix C Order of the Immigration Judge, United States Department of Justice, Executive Office for Immigration Review, Immigration Court (May 8, 2012) . App. 20

Appendix D Written Decision of the Immigration Judge, United States Department of Justice, Executive Office for Immigration Review, Immigration Court (May 1, 2012) App. 23

Appendix E Written Decision of the Immigration Judge, United States Department of Justice, Executive Office for Immigration Review, Immigration Court (March 27, 2012) . App. 29

Appendix F Order, United States Court of Appeals for the Eighth Circuit (October 28, 2013) App. 36

Appendix G Statutes App. 38
8 U.S.C. § 1227 App. 38
21 U.S.C. § 802 App. 39
Kan. Stat. Ann. § 21-5701 App. 39
Kan. Stat. Ann. § 21-5709 App. 39

RELEVANT DOCKET ENTRIES

Board of Immigration Appeals
Certified Administrative Record

A87-317-931

Moones Mellouli v. Holder

	Page
Decision of the Board of Immigration Appeals, August 7, 2012	1
Pre-BIA Decision Information	5
Notice of Appeal to the Board of Immigration Appeals, May 16, 2012	59
Notice of Entry of Appearance as Attorney or Representative, May 16, 2012	72
Order of the Immigration Judge, May 8, 2012	74
Written Decision of the Immigration Judge, May 8, 2012	75
Transcript of Hearing, March 6, 2012	78
Transcript of Hearing, March 20, 2012	82
Transcript of Hearing, May 1, 2012	93

Transcript of Hearing, May 8, 2012	103
Bond Exhibit 4	108
Bond Exhibit 3	146
Bond Exhibit 2	120
Pre-Immigration Judge Decision Information	159
Exhibit 1	288

RELEVANT DOCKET ENTRIES

United States Court of Appeals
for the Eighth Circuit

No. 12-3093

Moones Mellouli v. Eric H. Holder, Jr.

09/05/2012 Agency case docketed [3949717] [12-3093] (JMH)

09/05/2012 PETITION for Review of an order of the Board of Immigration Appeals (Rec'd by MAIL) filed by Petitioner Mr. Moones Mellouli w/service 09/04/2012 [3949789] [12-3093] (JMH)

09/05/2012 BRIEFING SCHEDULE SET AS FOLLOWS: Original file of originating court shall serve as record on appeal. Appendices required by 8th Cir. Rule 30A shall not be required. Clerk of originating court is requested to forward the file forthwith together with any exhibits. Administrative record due 10/15/2012. Moones Mellouli brief due 10/29/2012 Responsive brief is due 30 days from the date the court issues the Notice of Docket Activity filing the brief.[3949795] [12-3093] (JMH)

* * *

02/13/2013 **ARGUED & SUBMITTED in Kansas City** to Judges William Jay Riley, James

B. Loken, Bobby E. Shepherd on 02/13/2013 Mr. William Michael Sharma-Crawford for Petitioner Mr. Moones Mellouli and Mr. Anthony Paul Nicastro for Respondent Mr. Eric H. Holder, Jr.. Rebuttal by Mr. William Michael Sharma-Crawford for Mr. Moones Mellouli RECORDED [4004766] [12-3093] (BWB)

07/09/2013 OPINION FILED - THE COURT: William Jay Riley, James B. Loken and Bobby E. Shepherd
AUTHORING JUDGE:James B. Loken (PUBLISHED) [4052415] [12-3093] (LAB)

07/09/2013 **JUDGMENT FILED** [3949789-2] The petition for review is DENIED in accordance with the opinion of this court. WILLIAM JAY RILEY, JAMES B. LOKEN and BOBBY E. SHEPHERD Hrg Feb 2013 [4052422] [12-3093] (LAB)

* * *

10/28/2013 JUDGE ORDER: The petition for rehearing en banc is denied. The petition for panel rehearing is also denied. Judges Wollman, Murphy, Bye and Kelly would grant the petition for rehearing en banc. [4076023-2] PUBLISHED ORDER. Hrg Feb 2013 [4089908] [12-3093] (LAB)

11/04/2013 MANDATE ISSUED. [4092155] [12-3093] (LAB)

01/17/2014	Supreme Court Letter extending time to file cert petition until 02/25/2014. [4118094] [12-3093] (LAB)
02/28/2014	U.S. Supreme Court Notice of cert filed in the Supreme Court on 02/25/2014, case No. 13-1034 [4133196] [12-3093] (SRD)
06/30/2014	SUPREME COURT order filed granting cert petition. Order filed on 06/30/2014 in case No.13-1034. [4172337] [12-3093] (SRD)

NTA - Exhibit #1
DATE: 3/6/12
IJ John R. O'Malley

U.S. Department of Homeland Security
Notice to Appear

In removal proceedings under section 240 of the Immigration and Nationality Act:

Subject ID: 342209904

FIN #: 1001096567 File No: A087 317 931
DOB: [redacted]/1981 Event No: KAN1202000121

In the Matter of:

Respondent: Moones MELLOULI currently residing at: [redacted] N. CONANT AVENUE, KANSAS CITY MISSOURI 64153
(Number, street, city and ZIP code)
(Area code and phone number)

* * *

☒ 3. You have been admitted to the United States, but are removable for the reasons stated below.

The Department of Homeland Security alleges that you:

See Continuation Page Made a Part Hereof

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

See Continuation Page Made a Part Hereof

* * *

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at: 2345 Grand Boulevard, Suite 525 Kansas City MISSOURI US 64108

(Complete Address of Immigration Court, including Room Number, if any)

on a date to be set *(Date)* at a time to be set *(Time)*

to show why you should not be removed from the United States based on the charge(s) set forth above.

/s/Tami J. Nelson
TAMI J. NELSON SDDO
(Signature and Title of Issuing Officer)

Kansas City, Missouri
(City and State)

Date: February 17, 2012

See reverse for important information

Form I-862 (Rev. 08/01/07)

Note to Respondent

Warning: Any statement you make may be used against you in removal proceedings.

Alien Registration: This copy of the Notice to Appear served upon you is evidence of your alien registration while you are under removal proceedings. You are required to carry it with you at all times.

Representation: If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Executive Office for Immigration Review, pursuant to 8 CFR 3.16. Unless you so request, no hearing will be scheduled earlier than ten days from the date of this notice, to allow you sufficient time to secure counsel. A list of qualified attorneys and organizations who may be available to represent you at no cost will be provided with this notice.

Conduct of the hearing: At the time of your hearing, you should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Notice to Appear and that you are inadmissible or removable on the charges contained in the Notice to Appear. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the

receipt of evidence and to cross examine any witnesses presented by the Government. At the conclusion of your hearing, you have a right to appeal an adverse decision by the immigration judge.

You will be advised by the immigration judge before whom you appear of any relief from removal for which you may appear eligible including the privilege of departure voluntarily. You will be given a reasonable opportunity to make any such application to the immigration judge.

Failure to appear: You are required to provide the DHS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the DHS.

Mandatory Duty to Surrender for Removal: If you become subject to a final order of removal, you must surrender for removal to one of the offices listed in 8 CFR 241.16(a). Specific addresses on locations for surrender can be obtained from your local DHS office or over the internet at http://www.ice.gov/about/

dro/contact.htm. You must surrender within 30 days from the date the order becomes administratively final, unless you obtain an order from a Federal court, immigration court, or the Board of Immigration Appeals staying execution of the removal order. Immigration regulations at 8 CFR 241.1 define when the removal order becomes administratively final. If you are granted voluntary departure and fail to depart the United States as required, fail to post a bond in connection with voluntary departure, or fail to comply with any other condition or term in connection with voluntary departure, you must surrender for removal on the next business day thereafter. If you do not surrender for removal as required, you will be ineligible for all forms of discretionary relief for as long as you remain in the United States and for ten years after departure or removal. This means you will be ineligible for asylum, cancellation of removal, voluntary departure, adjustment of status, change of nonimmigrant status, registry, and related waivers for this period. If you do not surrender for removal as required, you may also be criminally prosecuted under section 243 of the Act.

Request for Prompt Hearing

To expedite a determination in my case, I request an immediate hearing. I waive my right to a 10-day period prior to appearing before an immigration judge.

Before: _____

(Signature of Respondent)

_____ Date:

(Signature and Title of Immigration Officer)

Certificate of Service

This Notice To Appear was served on the respondent by me on February 17, 2012, in the following manner and in compliance with section 239(a)(1)(F) of the Act.

☒ in person

* * *

☒ Attached is a list of organization and attorneys which provide free legal services.

The alien was provided oral notice in the English language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.

	THERESA SUH IEA
(Signature of Respondent if Personally Served)	(Signature and Title of officer)

U.S. Department of Homeland Security
Continuation Page for Form I862

Alien's Name	File Number	Date
Moones MELLOULI	A087 317 931 Event No: KAN1202000121	February 17, 2012

[Admit]

THE SERVICE ALLEGES THAT YOU:

1. You are not a citizen or national of the United States;
2. You are a native of TUNISIA and a citizen of TUNISIA;
3. You were admitted to the United States at Los Angeles International Airport on or about May 19, 2004 as a F-1 Student;
4. Your status was adjusted to that of Conditional Resident on January 26, 2009 under section 245 of the Act;
5. Your status was adjusted to that of Lawful Permanent Resident on March 9, 2011 under section 245 of the Act;
6. You were, on July 13, 2010, convicted in the District Court of Johnson County, Kansas for the offense of Possession of Drug Paraphernalia, to wit: a sock, to store, contain, conceal, inject, injest, inhale or otherwise introduce into the human body a controlled substance, in violation of the Uniform Controlled Substance Act, a class A misdemeanor, in violation of K.S.A. 2009 Supp. 21-36a09, and K.S.A. 21-4502(1)(a).
7. You were sentenced to a term of 359 days incarceration.

ON THE BASIS OF THE FOREGOING, IT IS CHARGED THAT YOU ARE SUBJECT TO REMOVAL FROM THE UNITED STATES PURSUANT TO THE FOLLOWING PROVISION(S) OF LAW:

==========

Section 237(a)(2)(B)(i) of the Immigration and Nationality Act, as amended, in that, at any time after admission, you have been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in Section 102 of the Controlled Substances Act, 21 U.S.C. 802), other than a single offense involving possession for one's own use of 30 grams or less of marijuana.

[Denied]

[See bond order]

Signature	/s/Tami J. Nelson TAMI J. NELSON	Title	SDDO

BOND Exhibit #2
DATE: 3/6/12
IJ John R. O'Malley

TAB A

RESPONDENT'S CRIMINAL HISTORY CHART

Respondent: Moones MELLOULI

Alien Number: A087 317 931

[*See following 2 pages*]

TAB, PAGES	ARREST DATE	DOCKET NUMBER	CHARGES	DISPOSITION	IMMIGRATION CONSEQUENCES
B 2-7	2/14/2012	12-010532	Obstruct or resist public safety officer	Pending	Discretion
			Speeding (61 MPH in a 35 MPH zone)	Pending	Discretion
			Failure to display a valid operator's license upon demand of a police officer	Pending	Discretion
C 8-14	4/04/2010	10CR0847	Possession of Drug Paraphernalia in violation of KSA 21-36a09	Convicted, sentenced to 359 days in jail	Ground of removability under INA § 231(a)(2)(B)(i0

D 15-19	4/04/2010	10TR199	Driving Under the Influence of Alcohol or Drugs (2nd) in violation of KSA § 21-4502(1)(a) Driving While Suspended in violation of KSA § 21-4502(1)(B)	Convicted, sentenced to 360 days in jail Dismissed	Discretion None
E 20-21	9/15/2009	09BA-CR04564	Excessive Blood Alcohol Content in violation of RSMo § 577.012	Convicted, sentenced to 30 days suspend-ed with 2 years of probation, which was revoked, and then sentenced to 30 days	Discretion

BOND Exhibit #2
DATE: 3/6/12
IJ John R. O'Malley

TAB C

IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS

Case No. 10CR0847
NO DRUGS

[Filed April 5, 2010]

STATE OF KANSAS,	)
Plaintiff,	)
	)
VS.	)
	)
MOONES MELLOULI,	)
Defendant.	)
	)

AFFIDAVIT

Comes now the affiant, of lawful age, being first duly sworn upon oath, in support of a probable cause finding for the detention of the defendant or the issuance of an arrest warrant, states as follows:

1. On April 4, 2010, Johnson County Sheriff's Office deputies were processing the defendant, MOONES MELLOULI, at the Johnson County Adult Detention Center, located at 27745 West 159th Street, New Century, Johnson County, Kansas, after he had been arrested. During the processing, MELLOULI did not declare any medication when asked if he had any drugs on his person. Later, deputies found four orange

tablets in his sock which he said were not his and he did not have a prescription for. MELLOULI said the tablets were Adderall that someone gave him for sleeping. The drugs had the inscription "M Aphet Salts 30 mg." which is identified as Adderall.

2. The above information was provided from the reports of the Johnson County Sheriff's Department.

/s/Sgt. G. Shelton 236
Affiant

Subscribed and sworn to before me by the affiant, Sgt. G. Shelton 236, on this 5th day of April, 2010.

/s/Terri A. Bowman
Notary Public

TERRI A. BOWMAN
Notary Public - State of Kansas
My Appt. Expires September 28, 2013

BOND Exhibit #3
DATE: 3/6/12
IJ John R. O'Malley

* * *

TAB F

IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS

Case No. 10CR0847
NO DRUGS

[Filed April 5, 2010]

STATE OF KANSAS,	)
Plaintiff,	)
	)
VS.	)
	)
MOONES MELLOULI,	)
Defendant.	)
	)

COMPLAINT

STATE OF KANSAS, JOHNSON COUNTY, ss:

I, Danetta F. Mendenhall, Assistant District Attorney of said County, being duly sworn on oath state to the Court that

MOONES MELLOULI

did the following:

COUNT I -- That on or about the 4th day of April, 2010 in the County of Johnson, State of Kansas, MOONES

MELLOULI did then and there unlawfully, feloniously and intentionally introduce or attempt to introduce an item, to-wit: four tables of Adderall into the Johnson County Adult Detention Center without the consent of the administrator, a severity level 6 non-person felony, in violation of K.S.A. 21-3826, K.S.A. 21-4704 and K.S.A. 21-4707. (trafficking in contraband in a jail)

/s/Danetta F. Mendenhall
Danetta F. Mendenhall/tb #22146
Assistant District Attorney
P.O. Box 728
Olathe, Kansas 66051-0728
(913) 715-3000

Subscribed and sworn to before me this 5th day of April, 2010.

/s/Terri A. Bowman
Notary Public

TERRI A. BOWMAN
Notary Public - State of Kansas
My Appt. Expires September 28, 2013

WITNESSES:
Deputy W. Wiley
Deputy Gonzalez
Valerie Kamb
Tiffany Eckert-Lumsdon
Malinda Combs
Christopher Krug
Jeremy Morris

IN THE DISTRICT COURT OF
JOHNSON COUNTY, KANSAS
Criminal Department Section ____

Case No. 10CR0847

[Print-off Date 04/05/2010]

State of Kansas)
)
Vs.)
)
MOONES MELLOULI)
)

INITIATION OF ACTION

Offense(s) Alleged: 21-3826 TRAFFIC CONTRABAND IN JAIL

✓ The Court finds from the complaint/affidavit that there is a probable cause to believe both that a crime has been committed in Johnson County, Kansas and that the defendant committed the same.

* * *

✓ The Court finds probable cause for detention of the above-named defendant.

Defendant's bond is set at $ 5000

✓ Cash or Surety (C/S)

* * *

✓ No drugs

* * *

* * *

_____ /s/_____

Date Judge of the District Court/Clerk

Entered by _____

IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS

Case No. 10cr847

[Filed July 13, 2010]

STATE OF KANSAS, Plaintiff,	)
VS.	)
MOONES MELLOULI, Defendant.	)

AMENDED COMPLAINT

STATE OF KANSAS, JOHNSON COUNTY, ss:

I, Samantha K. Shannon, Assistant District Attorney of said County, being duly sworn on oath state to the Court that

MOONES MELLOULI

did the following:

COUNT I – That on or about the 4th day of April, 2010 in the County of Johnson, State of Kansas, MOONES MELLOULI did then and there unlawfully, knowingly and willfully use or possess with intent to use drug paraphernalia, to-wit: a sock, to store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance, in violation of the Uniform Controlled Substances Act, a class A non-person misdemeanor, in violation of K.S.A. 2009 Supp.

21-36a09, and K.S.A. 21-4502(1)(a). (possession of drug paraphernalia)

/s/Samantha Shannon
Samantha K. Shannon #23850
Assistant District Attorney
P.O. Box 728
Olathe, Kansas 66051-0728
(913) 715-3000

Subscribed and sworn to before me this 13th day of July, 2010.

/s/Sarah Nitz
Notary Public

SARAH NITZ
Notary Public - State of Kansas
My Appt. Expires 7/11/13

WITNESSES:
Deputy W. Wiley
Deputy Gonzalez
Valerie Kamb
Tiffany Eckert-Lumsdon
Malinda Combs
Christopher Krug
Jeremy Morris

PLEA AGREEMENT

Case No. 10CR847

State of Kansas vs. Moones Mellouli

S. Shannon
Attorney (print)

P. Cramm
Attorney (print)

NOW, on this 13th day of July, 2010, the above parties and counsel do hereby confirm that the following terms and conditions are mutually acceptable and shall be recommended to the Court at the time of sentencing or disposition of this case, and are expressly conditioned on defendant appearing for sentencing as ordered.

TERMS

1. Guilty on amended ct 1
2. ~~12 M~~ sks 359 days sentence, consecutive to Columbia, MO 09CR4564
3. probation per/sir
4. lab fees
5. ~~A to enter guilty plea on 10TR199~~ sks
6. consecutive to 10TR199

* * *

Approved:

S. Shannon
Attorney for State of Kansas

Paul D. Cramm
Attorney for Defendant

/s/Moones Mellouli
Defendant

For Court Use Only (Seal)

2009 KANSAS SENTENCING GUIDELINES JOURNAL ENTRY OF JUDGMENT
Please use Journal Entry based on OFFENSE DATE

SECTION I. CASE IDENTIFYING INFORMATION

1. **Transaction No.**

2. **STATE v.** ☒ Male
   Moones Mellouli

3. **Court O.R.I. Number**
   KS046015J

4. **K.B.I. Number**
   33199365

5. **County**
   JOHNSON

6. **Court Case Number**
   10CR847

7. **Sentencing Judge**
   Hon. James Franklin Davis

8. **Sentencing Date**
   7·13·2010

9. **Defense Counsel:** ☒ Retained
Counsel Name (please print) Paul Cramm

10. **Type of Proceeding (Trial)**
☒ Guilty Plea

11. **Date of Conviction:**
7-13-2010

12. **Pre-Trial Status of Offender**
☒ Released on Bond

SECTION II. CRIMINAL HISTORY CLASSIFICATION

* * *

SECTION III. CURRENT CONVICTION INFORMATION

1. **Name of PRIMARY Offense of Conviction:**
Possession of drug paraphernalia

Count No.: 1 Date of Offense: 4-4-10
(Please use Journal Entry based on OFFENSE DATE)

2. **K.S.A. Title, Section, Subsection(s):**
21-36A09

* * *

3. **Grade of Offense:** (Check one in each row.)
☒ Misdemeanor, Class A

* * *

4. **Offense Category:**
☒ Nongrid

5. **Presumptive Sentencing Range:**
(Enter terms from appropriate grid.)

* * *

THIS FORM MUST BE ACCOMPANIED BY A COPY OF THE PRESENTENCE INVESTIGATION FORM PURSUANT TO K.S.A. 22-3439 AND A DOCUMENT CONTAINING INFORMATION REQUIRED BY K.S.A. 22-3426(c) and (d). PLEASE USE AN ADDITIONAL OFFENSES PAGE FOR ADDITIONAL OFFENSES OF CONVICTION.

6. **SPECIAL RULE APPLICABLE:**
☒ No

* * *

7. Did the Court make a ***SPECIAL FINDING*** that the crime was SEXUALLY MOTIVATED pursuant to the KS Offender Registration Act, K.S.A. 2008 Supp. 22-4902 (c)(14)?
☒ No
IF YES, PLEASE COMPLETE THE OFFENDER REGISTRATION SUPPLEMENT AND ATTACH IT TO THE JOURNAL ENTRY.

8. Was offender determined by the Court to be an ***AGGRAVATED HABITUAL SEX OFFENDER?*** (K.S.A. 21-4642)
☒ No
IF YES, PLEASE COMPLETE THE SEX CRIME SUPPLEMENT AND ATTACH IT TO THE JOURNAL ENTRY.

9. Is offender being sentenced pursuant to K.S.A. 21-4643 where offender is 18 years of age or

older and the victim is less than 14 years of age?
☒ No
IF YES, PLEASE COMPLETE THE SEX CRIME SUPPLEMENT AND ATTACH IT TO THE JOURNAL ENTRY.

10. Downward departure [K.S.A. 2008 Supp. 21-4719(a)] for a crime of extreme sexual violence (defined in K.S.A. 21-4716)?
☒ No
IF YES, PLEASE COMPLETE THE SEX CRIME SUPPLEMENT AND ATTACH IT TO THE JOURNAL ENTRY.

11. Did offender, as determined by the court, commit the current crime with a deadly weapon?
☒ No.
IF YES, PLEASE COMPLETE THE OFFENDER REGISTRATION SUPPLEMENT AND ATTACH IT TO THE JOURNAL ENTRY.

12. Was offender convicted of a violation of K.S.A. 2009 Supp. 21-36a03, Manufacture or attempted manufacture –(K.S.A. 65-4159) or K.S.A. 2009 Supp. 21-36a09, or 21-36a10 Possession of precursors with intent to manufacture – (K.S.A. 65-7006)?
☒ No
IF YES, was there a finding by the Court that such manufacture or possession was for personal use?
☒ No
IF NO, PLEASE COMPLETE THE OFFENDER REGISTRATION SUPPLEMENT AND ATTACH IT TO THE JOURNAL ENTRY.

13. Was offender convicted of a violation of K.S.A. 2009 Supp. 21-36a05, Cultivation, Distribution, Possession w/ intent to distribute – (K.S.A. 65-4161)?
⊠ No
IF YES, PLEASE COMPLETE THE OFFENDER REGISTRATION SUPPLEMENT AND ATTACH IT TO THE JOURNAL ENTRY.

SENTENCE IMPOSED:

* * *

4. **Nongrid Term: (Jail)** (For misdemeanor or nongrid felony.)
359 ⊠ days
(Enter county jail term above then check one of the following)
⊠ Underlying with probation granted.

* * *

5. **Probation Term (If Granted):**
⊠ 12 months

* * *

Probation Supervision to:
⊠ Court Services

* * *

SECTION IV. DEPARTURE INFORMATION

* * *

SECTION V. OTHER CONDITIONS

1. **General/Special Conditions of Probation (COMPLETE AND ATTACH ORDER OF PROBATION TO THIS JOURNAL ENTRY)**

2. **Costs Ordered:**

* * *

Total Court Costs	$ Ord

* * *

Other Lab Fee joco 10 CL896	$400.00

* * *

Booking/Fingerprint Fee	$ 45.00
TOTAL COSTS	$ Ord

* * *

SECTION VI: RECAP OF SENTENCE

1. **Sentence Imposed:**

* * *

Total Underlying Jail Term (if sentence imposed is probation): 359 days

* * *

3. **Probation Term Imposed (select one):**
   ☒ 12 months

* * *

4. **Jail Credit:** Enter dates (m/d/yy only) and days of potential jail credit for this case and check "A" if the days are actually awarded, or "N" if the days are not awarded by the court. (attach additional pages if necessary)

*Location J From 4·4·10 To: 4·5·10 = Days ⊠ N awarded to 10TR199

* * *

*Enter appropriate letters to indicate the type of location where credit may have been earned:

J=Jail TL=Treatment (Locked) TU=Treatment (Unlocked) RL=Residential (Locked) RU=Residential (Unlocked)

Sentencing Date: 7·13·10 - Total Number of Days of Jail Credit Actually Awarded 0 = Sentence Begins Date: _____

5. **Prior Case(s) to Which the Current Sentence is to Run Concurrent or Consecutive:**
Case No. 10TR199 County Johnson Sentence 360 Days Consecutive ⊠
Case No. 09CR4564 County Boone Co/Columbia Circuit Court Sentence _____ Consecutive ⊠

* * *

SECTION VII. SIGNATURES

1. **Judge's Signature** Date: 7-13-10

Signed: /s/James Franklin Davis

Printed: _____

2. Prosecuting Attorney:

Signed: Samantha Shannon

Printed: Samantha K. Shannon

Supreme Court Number: 23850

Date: 7·13·10

Address: Johnson County Courthouse
P.O. Box 728
Olathe, KS 66051

Phone No: 913-715-3112

3. Defense Attorney: Box 192

Signed: Paul D. Cramm

Printed: Paul D. Cramm

Supreme Court Number: 19543

Date: 7/13/10

Address: 100 E. Park
#210
Olathe 66061

Phone No: 913·322·3265

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

No. 13-1034

Supreme Court, U.S.
FILED
SEP 17 2014
OFFICE OF THE CLERK

In the Supreme Court of the United States

MOONES MELLOULI,
Petitioner,

v.

ERIC H. HOLDER, JR., Attorney General,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONER'S BRIEF ON THE MERITS

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September 17, 2014

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QUESTION PRESENTED

Under 8 U.S.C. § 1227(a)(2)(B)(i), the government may remove a noncitizen convicted of violating "any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21) ...." For a state drug paraphernalia conviction to support deportation of a noncitizen under this statute, must the government prove that the conviction related to a substance included in 21 U.S.C. § 802's definition of "controlled substance"?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

1. Statutory Background 1

2. Procedural History 4

SUMMARY OF ARGUMENT 9

ARGUMENT 12

I. Section 1227(a)(2)(B)(i) allows removal of only those noncitizens whose convictions relate to a controlled substance defined in 21 U.S.C. § 802. 12

A. The statute requires that the conviction relate to a federally defined controlled substance. 13

B. Section 1227(a)(2)(B)(i) requires the categorical approach and includes the element of a federally controlled substance.. 19

1. The plain text requires the use of the categorical approach. 19

2. *Section 1227(a)(2)(B)(i) requires a conviction to establish the element of a section-802 substance* 24

3. *The BIA and the Eighth Circuit read the statute inconsistently with the categorical approach.* 26

C. The Eighth Circuit's construction is atextual, fails to consider the statute as a whole, and leads to anomalous results. 29

D. Deference to the BIA is inappropriate. 35

II. Mellouli's statute of conviction is overinclusive, and its express terms establish a realistic probability of prosecution for conduct outside section 1227(a)(2)(B)(i). 42

A. The Kansas statute's explicit provisions demonstrate a realistic probability of prosecution for violations unrelated to section-802 substances. 43

B. Requiring proof of prosecutions for conduct expressly covered by the Kansas statute subverts the categorical approach and is inherently unfair. 49

C. Criminal complaints, docket entries, and news reports demonstrate that Kansas and other States prosecute offenses involving non-section-802 substances. 51

III. Alternatively, the Court could remand the case on the issue of divisibility. 56

CONCLUSION 58

STATUTORY APPENDIX

8 U.S.C. § 1227 1a

21 U.S.C. § 802 1a

Kan. Stat. Ann. § 21-5701 2a

Kan. Stat. Ann. § 21-5709 2a

TABLE OF AUTHORITIES

CASES

Albillo-Figueroa v. INS,
221 F.3d 1070 (9th Cir. 2000) 37

Barrome v. Att'y Gen.,
687 F.3d 150 (3d Cir. 2012) 37

Bustamonte-Barrera v. Gonzalez,
447 F.3d 388 (5th Cir. 2006) 23

Carachuri-Rosendo v. Holder,
560 U.S. 563 (2010) *passim*

Celotex Corp. v. Edwards,
514 U.S. 300 (1995) 19

Chevron v. Nat'l Res. Def. Council, Inc.,
467 U.S. 837 (1984) 8, 11, 35

Conn. Nat'l Bank v. Germain,
503 U.S. 249 (1992) 16

Coronado-Durazo v. INS,
123 F.3d 1322 (9th Cir. 1997) 37

Davis v. Michigan Dep't of Treasury,
489 U.S. 803 (1989) 25

Denis v. Att'y Gen.,
633 F.3d 201 (3d Cir. 2011) 37

Desai v. Mukasey,
520 F.3d 762 (7th Cir. 2008) 28

Descamps v. United States,
133 S. Ct. 2276 (2013) *passim*

Duncan v. Walker,
533 U.S. 167 (2001) 25

Evangelista v. Ashcroft,
359 F.3d 145 (2d Cir. 2004) 37

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 35, 36

Gerbier v. Holmes,
280 F.3d 297 (3d Cir. 2002) 23

Gonzales v. Duenas-Alvarez,
549 U.S. 183 (2007) 35, 43, 44, 45, 46

In re Alvarado-Alvino,
22 I. & N. Dec. 718 (B.I.A. 1999) 37

In re Batista-Hernandez,
21 I. & N. Dec. 955 (B.I.A. 1997) 37

In re Ruiz-Romero,
22 I. & N. Dec. 486 (B.I.A. Feb. 1, 1999) 37

Jean-Louis v. Att'y Gen.,
582 F.3d 462 (3d Cir. 2009) 45

Johnson v. United States,
559 U.S. 133 (2010) 20

Judulang v. Holder,
132 S. Ct. 476 (2011) 31

Kamagate v. Ashcroft,
385 F.3d 144 (2d Cir. 2004) 37

Kawashima v. Holder,
132 S. Ct. 1166 (2012) 35

Keene Corp. v. United States,
508 U.S. 200 (1993) 16

Leocal v. Ashcroft,
543 U.S. 1 (2004) 18, 35

Lopez v. Gonzales,
549 U.S. 47 (2006) *passim*

Lorillard v. Pons,
434 U.S. 575 (1978) 22

Matter of B-----,
5 I. & N. Dec. 479 (B.I.A. 1953) 21

Matter of Chairez-Castrejon,
26 I. & N. Dec. 349 (B.I.A. 2014) 21, 35

Matter of Gruenangerl,
25 I. & N. Dec. 351 (B.I.A. 2010) 37

Matter of Martinez Espinoza,
25 I. & N. Dec. 118 (B.I.A. 2009) *passim*

Matter of Martinez-Gomez,
14 I. & N. Dec. 104 (B.I.A. 1972) 21, 38

Matter of McClendon,
12 I. & N. Dec. 233 (B.I.A. 1967) 26

Matter of N-,
6 I. & N. Dec. 557 (B.I.A., A.G. 1955) 19

Matter of Oppedisano,
26 I. & N. Dec. 202 (B.I.A. 2013) 37

Matter of Paulus,
11 I. & N. Dec 274 (B.I.A. 1965) 26, 38

Matter of Pichardo-Sufren,
21 I. & N. Dec. 330 (B.I.A. 1996) 22

Matter of S--,
2 I. & N. Dec. 353 (B.I.A., A.G. 1945) 21

Matter of Schunk,
14 I. & N. Dec. 101 (B.I.A. 1972) 19

Mendieta-Robles v. Gonzales,
226 Fed. App'x 564 (6th Cir. 2007) 45

Missouri v. Frye,
132 S. Ct. 1399 (2012) 49

Moncrieffe v. Holder,
133 S. Ct. 1678 (2013) *passim*

Morales v. Trans World Airlines, Inc.,
504 U.S. 374 (1992) 15

Nijhawan v. Holder,
557 U.S. 29 (2009) 35

Padilla v. Kentucky,
559 U.S. 356 (2010) 23, 24

Ramos v. Att'y Gen.,
709 F.3d 1066 (11th Cir. 2013) 45

Rana v. Holder,
654 F.3d 547 (5th Cir. 2011) 37

Ransom v. FIA Card Servs., N.A.,
131 S. Ct. 716 (2011) 18

Rojas v. Att'y Gen.,
728 F.3d 203 (8th Cir. 2013) 18, 37

Russello v. United States,
464 U.S. 16 (1983) 16

State v. Bushnell,
No. 13-0326, 2014 WL 970025 (Iowa Ct. App. Mar. 12, 2014) 54

State v. McMannis,
747 P.2d 1343 (Kan. Ct. App. 1987) 4

State v. Unruh,
133 P.3d 35 (Kan. 2006) 4

Taylor v. United States,
495 U.S. 575 (1990) 29

United States ex rel Mylius v. Uhl,
210 F. 860 (2d Cir. 1914) 22

United States v. Aparicio-Soria,
740 F.3d 152 (4th Cir. 2014) 45

United States v. Grisel,
488 F.3d 844 (9th Cir. 2007) 45

Vasquez v. Holder,
602 F.3d 1003 (9th Cir. 2010) 37

CONSTITUTION

U.S. Const., Art I, § 8 23

STATUTES

8 U.S.C. § 156a 22

8 U.S.C. § 1101(a)(43) 37

8 U.S.C. § 1182 8, 17, 34

8 U.S.C. § 1184 17

8 U.S.C. § 1226(c)(1)(B)	49
8 U.S.C. § 1227	*passim*
8 U.S.C. § 1229b(a)	8
8 U.S.C. § 1251	22, 33, 37
8 U.S.C. § 1357(d)	17
8 U.S.C. § 1375a(d)(2)(B)(iv)	17
21 U.S.C. § 802	*passim*
21 U.S.C. § 811	2, 48
21 U.S.C. § 812(b)	2
21 U.S.C. § 841	2
21 U.S.C. § 863	4, 32, 40
28 U.S.C. § 1254(1)	1
35 Pa. Cons. Stat. § 780-113	39
720 Ill. Comp. Stat. 550/4(c)	41
720 Ill. Comp. Stat. 600/3.5	40, 41
730 Ill. Comp. Stat. 5/5-1-14	41
Act of February 18, 1931, 46 Stat. 1171	22
Ala. Code § 13a-5-7(a)(1)	39
Ala. Code § 13a-12-214	40
Ala. Code § 13a-12-260(c)	40
Alaska Stat. § 11.71 *et seq*	39

Anti-Drug Abuse Act of 1986, Pub. L. 99-570, 100 Stat. 3207, Oct. 27, 1986 22, 33

Ariz. Rev. Stat. § 13-604(A) 39

Ariz. Rev. Stat. § 13-3405(B)(1) 40

Ariz. Rev. Stat. § 13-3415(A) 39, 40

Ark. Code Ann. § 5-4-401(b)(1) 39

Ark. Code Ann. § 5-64-419(b)(5)(A) 40

Ark. Code Ann. § 5-64-443(a)(1) 39, 40

Cal. Health & Safety Code § 11007 29

Cal. Health & Safety Code § 11357 41

Cal. Health & Safety Code § 11364.7 40, 41

Cal. Penal Code § 19 41

Cal. Penal Code § 379 29

Colo. Rev. Stat. § 18-18-406(5)(a)(I) 40

Colo. Rev. Stat. § 18-18-426 39

Colo. Rev. Stat. § 18-18-428(2) 39, 40

Conn. Gen. Stat. § 21a-267 39, 40

Conn. Gen. Stat. § 21a-279 40

Conn. Gen. Stat. § 53a-36 39, 40

Conn. Gen. Stat. § 53a-42 40

Controlled Substances Act, § 212(a)(5) 34

Controlled Substances Act, § 241(a)(11) 34

D.C. Code § 48-1103(a) 39

Del. Code Ann. tit. 11, § 4206(b) 39

Del. Code Ann. tit. 16, § 4763(b) 40

Del. Code Ann. tit. 16, § 4771 39

Del. Code Ann. tit. 16, § 4774(a) 39, 40

Fla. Stat. § 775.082(4)(a) 39

Fla. Stat. § 893.13(6)(b) 40

Fla. Stat. § 893.147(1) 39, 40

Ga. Code Ann. § 16-13-2(b) 40

Ga. Code Ann. § 16-13-32.2 39, 40

Ga. Code Ann. § 17-10-3(a) 39

Idaho Code Ann. § 37-2732(c)(3) 40

Idaho Code Ann. § 37-2734A 39, 40

Immigration and Nationality Act of 1952, Pub L. 82-414 66 Stat. 163 22

Immigration Act of 1990, Pub. L. 101-649, §§ 601(a), 602(a), 104 Stat. 4978 (1990) 35

Ind. Code. § 35-48-4-8.3 40, 41

Ind. Code. § 35-50-3-2 41

Intelligence Authorization Act for Fiscal Year 2000, Pub. L. 106-120, § 809, 113 Stat. 1606 (1999) 34

Iowa Code § 124.401(5) 41

Iowa Code § 124.414 40, 41

Iowa Code § 903.1	41
Kan. Stat. Ann. § 21-36a05(a)(4) (2009)	52
Kan. Stat. Ann. § 21-36a09	5
Kan. Stat. Ann. § 21-5701	*passim*
Kan. Stat. Ann. § 21-5706	40, 41, 52
Kan. Stat. Ann. § 21-5709	*passim*
Kan. Stat. Ann. § 21-6602(a)(1)	39
Kan. Stat. Ann. § 65-4102	48
Kan. Stat. Ann. § 65-4105	3
Kan. Stat. Ann. § 65-4107	3
Kan. Stat. Ann. § 65-4109	3
Kan. Stat. Ann. § 65-4111	3
Kan. Stat. Ann. § 65-4113	3
Ky. Rev. Stat. Ann. § 218A.500(5)	39
Ky. Rev. Stat. Ann. § 532.090(1)	39
La. Rev. Stat. Ann. § 40:966(E)	40
La. Rev. Stat. Ann. § 40:1023(c)	39
La. Rev. Stat. Ann. § 40:1025	39, 40
Mass. Gen. Laws Ch. 94C § 1	55
Mass. Gen. Laws Ch. 94C § 31	55
Mass. Gen. Laws Ch. 94C § 32D	55
Mass. Gen. Laws Ch. 94C §32I	40, 55

Md. Crim. Law § 5-601(c)(2)(i)	40
Md. Crim. Law § 5-619(c)(2)	39, 40
Me. Rev. Stat. tit. 17, § 1111-A(4-B)	39
Mich. Comp. Laws § 333.7403(2)(d)	41
Mich. Comp. Laws § 333.7453	40, 41
Mich. Comp. Laws § 333.7455	41
Minn. Stat. § 152.01(subd. 18(a))	40
Minn. Stat. § 152.027(subd. 4(a))	41
Minn. Stat. § 152.092	40, 41
Minn. Stat. § 609.02(subd.4(a))	41
Miss. Code Ann. § 41-29-139(d)(1)	39
Mo. Rev. Stat. § 195.202(3)	40
Mo. Rev. Stat. § 195.233(2)	39, 40
Mo. Rev. Stat. § 558.011(1)(5)	39
Mont. Code Ann. § 45-9-102(2)	40
Mont. Code Ann. § 45-10-103	39, 40
N.C. Gen. Stat. § 15A-1340.23(c)	39
N.C. Gen. Stat. § 90-95	40
N.C. Gen. Stat. § 90-113.22	39, 40
N.D. Cent. Code § 12.1-32-01(5)	39
N.D. Cent. Code § 19-03.1-23(7)	40
N.D. Cent. Code § 19-03.4-03	39, 40

N.H. Rev. Stat. Ann. § 318-B:2(II) 40

N.H. Rev. Stat. Ann. § 318-B:26 41

N.H. Rev. Stat. Ann. § 651:2(II)(c) 41

N.J. Stat. Ann. § 2C:35-10(a)(4) 40

N.J. Stat. Ann. § 2C:36-2 39, 40

N.J. Stat. Ann. § 2C:43-8 39, 40

N.M. Stat. Ann. § 30-31-23 40

N.M. Stat. Ann. § 30-31-25.1 40

N.Y. Penal Law § 70.15(1) 41

N.Y. Penal Law § 220.50 40, 41

Neb. Rev. Stat. § 28-416(13) 41

Neb. Rev. Stat. § 28-441 40, 41

Neb. Rev. Stat. § 29-436 41

Nev. Rev. Stat. § 193.150 39

Nev. Rev. Stat. § 453.566 39

Ohio Rev. Code Ann. § 2925.14(F)(1) 39

Ohio Rev. Code Ann. § 2929.24(A)(4) 39

Okla. Stat. tit. 63, § 2-402(B)(2) 40

Okla. Stat. tit. 63, § 2-405 39, 40

Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208, § 305, 110 Stat. 3009 (1996) 33

Or. Rev. Stat. § 475.565 39

R.I. Gen. Laws § 21-28.5-2 40

S.C. Code Ann. § 44-53-391 39

S.D. Codified Laws § 22-6-2 39, 40

S.D. Codified Laws § 22-42-6 40

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Eighth Circuit, App. 1-14, is reported at 719 F.3d 995. The administrative decisions of the Immigration Judge, App. 23-28, 29-35, and the Board of Immigration Appeals, App. 17-19, are unreported.

JURISDICTION

The court of appeals entered its judgment and opinion on July 9, 2013. App. 1. It denied Petitioner's timely petition for panel rehearing or rehearing *en banc* by a seven to four vote on October 28, 2013. App. 36-37. Petitioner filed a timely writ of certiorari on February 25, 2014, following an extension of time granted by Justice Alito. This Court granted the writ on June 30, 2014. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutes implicated in this case, 8 U.S.C. § 1227(a)(2)(B)(i) (defining classes of deportable aliens), 21 U.S.C. § 802(6) (defining "controlled substance"), Kan. Stat. Ann. § 21-5701(a), (f) (defining "controlled substance" and "drug paraphernalia"), and Kan. Stat. Ann. § 21-5709 (outlawing use or possession with intent to use drug paraphernalia) are reprinted in a Statutory Appendix. Stat'y App. 1a-2a.

STATEMENT OF THE CASE

1. Statutory Background

The government may remove a noncitizen "convicted of a violation of . any law or regulation of a State, the United States, or a foreign country relating

to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana." 8 U.S.C. § 1227(a)(2)(B)(i). The Government removed Mellouli under this provision based on his Kansas misdemeanor conviction for possession of drug paraphernalia, in his case a sock.

The Controlled Substances Act of 1970 ("CSA"), now codified in Title 21, created a complex scheme criminalizing conduct associated with various substances controlled under the Act. Section 802 of Title 21 defines the Act's terms. Congress defined "controlled substance" as a "drug or other substance, or immediate precursor, included in" one of five different schedules, organized by potential for abuse and accepted medical use. 21 U.S.C. §§ 802(6), 812(b). Congress provided detailed criteria governing a substance's designation as a controlled substance and authorized the Attorney General to amend the schedules through a rule-making process based on the same specified criteria. 21 U.S.C. § 811. Congress also established a series of criminal offenses and corresponding penalties with reference to these definitions and schedules. *See, e.g.*, 21 U.S.C. §§ 841(a)(1) (making it unlawful to "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance"); 841(b)(1)-(3) (tying penalties to schedules); 841(c) (defining separate offenses for "listed chemicals"). Nowhere in the CSA did Congress incorporate in its definitions substances controlled only by other jurisdictions.

Kansas and other States have enacted their own drug laws. Kansas's law defines "controlled substance" as any drug, substance or immediate precursor included on the State's own set of schedules. Kan. Stat. Ann. § 21-5701(a) (referencing Kan. Stat. Ann. §§ 65-4105, 65-4107, 65-4109, 65-4111 and 65-4113). Kansas controls certain substances that are not controlled substances under section 802. *See* Kan. Stat. Ann. § 21-5701. At the time of Mellouli's conviction, Kansas controlled at least nine substances not included in section 802's definition of controlled substance:

- Salvia divinorum or salvinorum A (Kan. Stat. Ann. § 65-4105(d)(30) (2010));
- Datura stramonium, commonly known as gypsum weed or jimson weed (Kan. Stat. Ann. § 65-4105(d)(31) (2010));
- 1–Pentyl–3–(1–naphthoyl)indole (Kan. Stat. Ann. § 65-4105(d)(33) (2010));
- 1–Butyl–3–(1–naphthoyl)indole (Kan. Stat. Ann. § 65-4105(d)(34) (2010));
- 1–(3–[trifluoromethylphenyl]) piperazine ("TFMPP") (Kan. Stat. Ann. § 65-4105(d)(36) (2010));
- Butyl nitrite (Kan. Stat. Ann. § 65-4111(g) (2010));
- Propylhexedrine (Kan. Stat. Ann. § 65-4113(d)(1) (2010));
- Pseudoephedrine (Kan. Stat. Ann. § 65-4113(f) (2010)); and
- Ephedrine (Kan. Stat. Ann. § 65-4113(e) (2010)).

Compare Pet. Cert. 3 n.1 *with* Br. in Opp. ("BIO") 9-10; *see also* Pet'r's. Reply at 7-8. Pseudoephedrine and ephedrine are only "listed chemicals" under the federal

statute, *see* BIO 9-10, and are thus not included as "controlled substance[s] (as defined in section 802 of Title 21)." *Compare* 21 U.S.C. § 802(6) *with* § 802(33). Thus, a controlled substance offense under Kansas law does not necessarily involve a controlled substance under section 802.

Indeed, the acts leading to Mellouli's Kansas misdemeanor would not be a crime under federal law. Kansas defines drug paraphernalia and the associated criminal acts differently than the CSA does. Federal law covers only selling, transporting in interstate commerce, importing and exporting drug paraphernalia. 21 U.S.C. § 863(a). Kansas criminalizes use of paraphernalia. Kan. Stat. Ann. § 21-5709(b)(2). Kansas also defines paraphernalia to include equipment or material "used" to store, contain, or conceal a Kansas controlled substance, while the federal definition is confined to equipment or material "primarily intended or designed for use" for those purposes. *Compare* Kan. Stat. Ann § 21-5701(f) *with* 21 U.S.C. § 863(d). Consequently, in Kansas, possessing a sock can satisfy the elements of a drug paraphernalia crime while it cannot under federal law. *See State v. Unruh*, 133 P.3d 35, 44 (Kan. 2006) (use to store, contain, conceal is sufficient); *State v. McMannis*, 747 P.2d 1343, 1346 (Kan. Ct. App. 1987) (use with a State controlled substance renders object paraphernalia).

2. Procedural History

1. Moones Mellouli entered the United States on a student visa in 2004. J.A. 12. He earned a bachelor of arts degree, *magna cum laude*, from Drury University in 2006, as well as master's degrees in applied

mathematics and economics from the University of Missouri-Columbia in 2009. *Id.* at 224-26. Mellouli worked as an actuary for two and a half years and taught mathematics at the University of Missouri-Columbia for three years. *Id.* at 183. He became a conditional permanent resident on January 26, 2009, J.A. 12, and a lawful permanent resident on March 9, 2011. Mellouli has been engaged to be married to a United States citizen since December 23, 2011. A.R. 228-30.

2. Immigration and Customs Enforcement officers arrested Mellouli in February 2012 and charged him as deportable under 8 U.S.C. § 1227(a)(2)(B)(i) based on his Kansas misdemeanor conviction for possession of drug paraphernalia. J.A. 6-13. In 2010, Mellouli had pleaded guilty to "unlawfully, knowingly and willfully us[ing] or possess[ing] with intent to use drug paraphernalia, to wit: a sock, to store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance." *Id.* at 23-26 (a violation of Kan. Stat. Ann. § 21-36a09 in 2010; recodified at Kan. Stat. Ann. § 21-5709). He was sentenced to a suspended term of 359 days and twelve months' probation. *Id.* at 27-34. He successfully completed probation in July 2011. A.R. 13.

3. The documents the Government submitted underlying Mellouli's conviction—the complaint and plea agreement—did not specify the controlled substance involved. J.A. 23-26. Mellouli argued to the Immigration Judge that the record of conviction documents did not establish his deportability because Kansas's paraphernalia law was not limited to controlled substances defined in section 802 and his

record of conviction did not establish a relationship between the paraphernalia and a section-802 substance. App. 30-31. The Immigration Judge found that the absence of a specific controlled substance in Mellouli's record of conviction did not matter even though the Kansas definition of "controlled substance" was broader than the federal definition included in the removal ground. *Id.* at 33-34. That the Kansas drug paraphernalia statute criminalizes behavior associated with "the drug trade in general" was sufficient. *Id.* at 31-32 (quoting *Matter of Martinez Espinoza*, 25 I. & N. Dec. 118, 121 (B.I.A. 2009)).

Based on a probable cause affidavit tied to a charge that had been abandoned by the Kansas prosecutor, the Immigration Judge went on to conclude that the government established by clear and convincing evidence that Mellouli's conviction was not an offense involving possession for one's own use of thirty grams or less of marijuana. App. 34-35; J.A. 19-20, 23-24. The probable cause affidavit alleged that sheriff's reports stated that Mellouli's sock contained four tablets of Adderall when he was processed into jail on April 4, 2010 on a charge of driving while intoxicated. J.A. 17-18; A.R. 138. There is no record of any lab testing. A.R. 90. Mellouli never admitted to the abandoned charge or conceded the contents of the probable cause affidavit.

On motion for reconsideration, the Immigration Judge once again found that the conviction fell within § 1227(a)(2)(B)(i) because it involved "other conduct associated with the drug trade in general." App. 25-26 (quoting *Matter of Martinez Espinoza*, 25 I. & N. Dec. at 121).

The Board of Immigration Appeals agreed that a "conviction for possession of drug paraphernalia involves the drug trade in general, and thus, is covered under" 8 U.S.C. § 1227(a)(2)(B)(i). App. 18. It also cited *Matter of Martinez Espinoza* as controlling. *Id.*

4. Mellouli filed a petition for review with the Eighth Circuit. C.A. Pet'r's Br. 7. He argued that the Government failed to satisfy its burden of proving that his conviction related to a controlled substance as defined by 21 U.S.C. § 802 because the record of conviction did not establish that the substance associated with the sock was federally controlled and the Kansas statute of conviction includes substances absent from the federal controlled substance list. C.A. Pet'r's Br. 15. The Government maintained that Mellouli's conviction involved "the drug trade in general," which was sufficient to establish that his possession of a sock involved a violation of a State law relating to a controlled substance. C.A. Resp't's. Br. 14.

The Eighth Circuit denied the petition for review. Analyzing Mellouli's statutory argument, the court acknowledged that Kansas's schedule of controlled substances "may not map perfectly with the federal schedules." App. 4 (internal quotation omitted). But the Eighth Circuit relied on Kansas's adoption of the Uniform Controlled Substances Act to conclude that "there is little more than a theoretical possibility" that a Kansas controlled substance conviction will not involve a section-802 substance. *Id.* (internal quotation omitted)

On this premise, the court deferred to the BIA's position that "a state court drug paraphernalia conviction 'relates to' a federal controlled substance

because it is a crime 'involving other conduct associated with the drug trade in general.'" App. 10 (quoting *Matter of Martinez Espinoza*, 25 I. & N. Dec. at 121). The Eighth Circuit concluded deference was appropriate under *Chevron v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984), because the BIA's interpretation was a reasonable reading of "relating to" in section 1227(a)(2)(B)(i). *Id.* The court decided that for those "States such as Kansas that adopted the Uniform Controlled Substance Act," the BIA could reasonably conclude that "any drug paraphernalia conviction was categorically, a violation of a law 'relating to a controlled substance' within the meaning of 8 U.S.C. § 1227(a)(2)(B)(i)." *Id.* This included "a conviction for violating the Kansas paraphernalia statute." *Id.* at 11.

The Eighth Circuit denied Mellouli's petition for panel rehearing and rehearing *en banc* on a vote of seven to four. *Id.* at 11.

5. This Court granted certiorari. 134 S. Ct. 2873.

6. Mellouli has been removed from the United States and has no way to return, despite being engaged to marry a U.S. citizen. He was deemed ineligible for cancellation of removal because he had not been a lawful permanent resident for five years. 8 U.S.C. § 1229b(a). And he is considered inadmissible to return to the U.S. under the parallel provision in 8 U.S.C. § 1182(a)(2)(A)(i)(II), which can be waived only if the conviction concerned a single offense of simple possession of marijuana. 8 U.S.C. § 1182(h). Thus, the Kansas misdemeanor conviction for which Mellouli received no jail time has resulted in his permanent removal from the United States.

SUMMARY OF ARGUMENT

Congress authorized immigration officials to remove noncitizens convicted of some drug offenses, but not all drug offenses. An offense justifying removal must relate to a drug that the United States has chosen to control, rather than to the larger universe of drugs subject to State and foreign regulation. Yet here the Eighth Circuit held that lawfully admitted residents may be removed based on conduct involving substances that federal law does not control. Congress precluded such overreaching by expressly incorporating the federal controlled substance definition into the statute authorizing removal. *See* 8 U.S.C. § 1227(a)(2)(B)(i) (citing 21 U.S.C. § 802). The Eighth Circuit's holding circumvents this plain language with a convoluted construction that ignores the statute's text, structure, purpose, and history. This Court has repeatedly struck down similar efforts to expand the scope of removal based on state drug convictions and should do so again here. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1691-92 (2013) (distribution of marijuana that could include social sharing of a small amount); *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 575 (2010) (possession of Xanax); *Lopez v. Gonzales*, 549 U.S. 47, 51 (2006) (aiding and abetting another's possession of cocaine).

To justify removal, the language of section 1227(a)(2)(B)(i) requires that a conviction be related to a controlled substance as defined in 21 U.S.C. § 802. Ordinary principles of statutory construction support this reading, including considering the statute as a whole and Congress's use of similar and different language elsewhere in Title 8. The statutory and legislative history confirm as much. Rather than

accepting this straightforward application of the law, the Government seeks to distort the statutory language to make any drug paraphernalia conviction a basis for removal, but its approach reads out of the statute the limitations Congress imposed by incorporating the section 802 definition.

Because the statute focuses on a conviction, it invokes the categorical approach. The categorical approach requires focus on the elements of the State, federal, or foreign crime. Under this approach, removal under section 1227(a)(2)(B)(i) is limited to convictions encompassing only controlled substances defined in 21 U.S.C. § 802. But the Kansas statute outlaws conduct beyond that encompassed in section 1227(a)(2)(B)(i). The Eighth Circuit ignored the section-802 element in the federal removal ground, instead deciding that the law under which Mellouli was convicted was associated with the drug trade in general. This approach abandons reliance on the facts established by conviction--and with it the fairness and uniformity the categorical approach promotes.

The Eighth Circuit's decision is unanchored to the text and leads to anomalous outcomes. It relies on the degree of overlap between State controlled-substance schedules and the federal definition in section 802. This approach would give administrative decision-makers authority not provided by Congress to determine just how much overlap is sufficient to justify removal. The approach would also make the removal decision depend on not what drugs a State has outlawed, but rather how a State codified its offenses. Further, it would result in deportability for paraphernalia associated

with a substance controlled only by Kansas but not for possession or sale of the same substance.

There is no place for *Chevron* deference in this case. The statutory question is not one subject to agency interpretation; in previous cases the Court has itself determined which elements must be established for deportation. Also, the text and other evidence of congressional intent are unambiguous, leaving no room for deference. Moreover, the agency's reading is unreasonable because it applies the same statute inconsistently to different crimes and its interpretation leads to removal of noncitizens for minor offenses.

The Eighth Circuit misconstrued the requirements of section 1227(a)(2)(B)(i), and then it compounded the error by assuming that Kansas does not actually prosecute the non-section-802 drug offenses its legislature created. The Eighth Circuit rejected Mellouli's argument that he could not be removed although Kansas's definition of "controlled substance" was broader than Congress's definition in 21 U.S.C. § 802, reasoning in part that "there is little more than a 'theoretical possibility' that a conviction for a controlled substance offense under Kansas law will *not* involve a controlled substance as defined in 21 U.S.C. § 802." The Eighth Circuit opined that a Kansas paraphernalia conviction is therefore categorically related to a controlled substance as that term is federally defined. No legal imagination is required to decide that Kansas enforces its law as written, including those provisions outside the federal removal ground, and no further proof of the realistic probability of prosecution should be required. The Eighth Circuit's rule conflicts with the categorical approach,

undermines its purpose, and is inherently unfair. Nonetheless, it is evident that Kansas, along with other States, prosecutes crimes involving substances other than those defined in section 802.

The Court should reverse the Eighth Circuit's judgment and remand to vacate the order of removal.

ARGUMENT

I. Section 1227(a)(2)(B)(i) allows removal of only those noncitizens whose convictions relate to a controlled substance defined in 21 U.S.C. § 802.

Section 1227(a)(2)(B)(i) requires that, to support deportability, a State conviction must have as an element a section-802 controlled substance. Straightforwardly read, the statutory text says so. The statutory reference to section 802 makes sense only as a condition on the conviction supporting removal. Additionally, Congress's careful use of references to various portions of the Controlled Substances Act elsewhere in Title 8 supports the conclusion that its choice to refer to "a controlled substance (as defined in section 802 of Title 21)" was purposeful. The Eighth Circuit's reading, which ties the section-802 definitions to the violated statute rather than the conviction itself, effectively reads out of the statute the limit Congress's reference to section 802 places on deportability.

The plain text is reinforced by the requirement—again by virtue of the word "conviction" in the statute—that the categorical approach must be used to determine whether any given conviction supports removal. The categorical approach compares the statute of conviction with the requirements of the

federal statute (often called the "generic federal definition" of the removal criterion) to determine whether the conviction *necessarily* requires each element of the generic federal definition. If it does not, the analysis is at an end and the conviction is insufficient to support deportation. The categorical approach promotes consistency, uniformity, and a streamlined approach. The Eighth Circuit's departure from the elements of the generic federal definition effectively abandoned the categorical approach altogether. It also departs from the statutory text, fails to consider the entire statutory scheme, and dictates results Congress could not have intended.

A. The statute requires that the conviction relate to a federally defined controlled substance.

1. Examining the "everyday understanding" of the words Congress used, *Lopez*, 549 U.S. at 53, and the "commonsense conception" of those terms, *Carachuri-Rosendo*, 560 U.S. at 573, the text of section 1227(a)(2)(B)(i) makes clear that a conviction must be tied to the "controlled substance" definition Congress provided. The statute allows removal for a conviction under a State, federal, or foreign law, but only if that conviction relates to a section-802 controlled substance, not just any substance a State or foreign government controls that is not listed in section 802.

The relevant portion of section 1227 provides that: "Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other

than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable." 8 U.S.C. § 1227(a)(2)(B)(i). Naturally read, this sentence makes noncitizens deportable only if convicted of a statutory violation that relates to a controlled substance, but only a controlled substance defined in section 802. The *conviction* must be linked to a section-802 substance—it is insufficient, as the Government would have it, for just the *law or regulation* to relate to a section-802 substance.

The reason is commonsense: asking whether a statutory violation relates to "a controlled substance" as defined by section 802 is intuitive, while asking whether a State law criminalizing perhaps dozens of additional non-section-802 substances relates to at least one among the hundreds of substances identified by section 802 is not. A reader instinctively links "a controlled substance" to those nouns (a violation, a conspiracy, an attempt) that language could sensibly describe. *See generally Lopez*, 549 U.S. at 56 (reasoning that when reading "felony punishable under the CSA" to determine whether an alien is removable, "we instinctively understand 'felony punishable as such under the Act' or 'felony as defined by the Act'"). And that interpretation is confirmed in the next clause—"other than a single offense involving possession for one's own use of 30 grams or less of marijuana." Like the rule itself, the exception describes a kind of conviction, not a kind of law.

The natural reading of this sentence is the only reading Congress could intend. The phrase "relating to" may have a broad ordinary meaning, namely, "'to stand in some relation; to have bearing or concern; to

pertain; refer; to bring into association with or connection with.'" *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (quoting *Black's Law Dictionary* 1158 (5th ed. 1979)). So if section 1227 requires only that the law (or regulation) relates to a section-802 substance, a noncitizen convicted of *any* offense under *any* domestic or foreign law that regulates *any* section-802 substance is removable—whether or not the conviction itself relates to a section-802 substance. Yet this interpretation is self-defeating: it eliminates any real limiting effect of the statutory citation to the definition in section 802. Congress would not take "the trouble to incorporate its own statutory scheme," here a scheme specific to this particular class of deportable offenses, "if it meant courts to ignore it whenever a State [or foreign government] chose to punish" conduct related to a different substance. *Lopez*, 549 U.S. at 58 (rejecting Eighth Circuit's reading that would "render the law of alien removal dependent on varying state [law] classifications even when Congress has apparently pegged the immigration statutes to the classifications Congress itself chose").

Still less would Congress enact a substance-specific exception. As read by the BIA, section 1227 allows States and foreign governments to make conduct relating to any substances they choose—everything from jimson weed to poppy seeds—trigger removal under U.S. law. But why would Congress retrieve from the ocean of possible offenses the solitary crime of possessing marijuana "for one's own use"? And why would it define that already specific crime *to the very gram*? The particularity of the text contradicts the permissiveness of the BIA's interpretation. Congress

would not legislate the immigration consequences of one exception amid hundreds of controlled substances only to abandon that clarity to the vagaries of State and foreign substance classifications.

The Government's reading makes a noncitizen removable for a state or foreign law violation connected to any controlled substance whether or not it is "a controlled substance (as defined in section 802 of Title 21)." When the Government connects "controlled substance" not to "conviction," but instead to laws of "a State, the United States, or a foreign country," "the Government argues for a result that 'the English language tells us not to expect,' so we must be 'very wary of the Government's position.'" *Carachuri-Rosendo*, 560 U.S. at 575 (quoting *Lopez*, 549 U.S. at 54); *Lopez*, 549 U.S. at 58 (rejecting interpretation that would render removal dependent on varying state laws).

2. Congress's use of similar and different words elsewhere in the Immigration and Naturalization Act ("INA") demonstrates that Congress uses different language when it wants to reach conduct beyond the substances included in the federal definition of controlled substance. Courts should presume that "a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Where Congress includes language in one section of a statute but omits it elsewhere in the statute, "it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

Congress has used language relating to controlled substances precisely in the immigration statutes, prescribing different consequences for violations relating to different terms. Although Congress limited removal under section 1227(a)(2)(B)(i) to convictions relating to only those defined as "a controlled substance" in 21 U.S.C. § 802, it tied inadmissibility to illicit trafficking in "controlled substance or [] any listed chemical (as defined in section 802 of Title 21)," a broader category. 8 U.S.C. § 1182(a)(2)(C)(i). Congress has prescribed other consequences elsewhere in Title 8 for other conduct. *See* 8 U.S.C. § 1184(d)(3)(B)(iii) and (r)(5)(B)(iii) (allowing Secretary of Homeland Security to deny certain visa applications when applicant has at least three convictions of crimes "relating to a *controlled substance or alcohol* not arising from a single act") (emphasis added); 8 U.S.C. § 1357(d) (allowing detainer of any alien who has been "arrested by a Federal, State, or local law enforcement official for a violation of *any law relating to controlled substances*") (emphasis added); 8 U.S.C. § 1375a(d)(2)(B)(iv) (requiring international marriage brokers to collect signed certification of any "Federal, State, or local arrest or conviction ... for offenses related to *controlled substances or alcohol*") (emphasis added). Section 1227(a)(2)(B)(i) is one of the few places in Title 8 where Congress has relied on the narrow reference to "a controlled substance (as defined in section 802 of Title 21)." When Congress wants to encompass substances beyond those defined in the Controlled Substances Act (e.g. "controlled substances or alcohol," "listed chemical," "any law relating to controlled substances"), it knows how to do so.

The text of the federal removal ground requires "a violation of any law or regulation of a State ... relating to *a* controlled substance," not multiple controlled substances. If Congress did not want the conviction to be defined by the substances in section 802, but rather any controlled substance included in a State or foreign definition, it could have said "any law relating to controlled substances" as it did elsewhere in Title 8. 8 U.S.C. § 1357(d).

3. The Eighth Circuit's construction renders Congress's reference to its "controlled substance" definition superfluous. Kansas law prohibits the mere use of a sock to store non-section-802 substances such as salvia pills, TFMPP, pseudoephedrine, or ephedrine, with nothing more required for a conviction. *See* Kan. Stat. Ann §§ 21-5701(f), 21-5701(a). No such conviction has any relation to a controlled substance defined in section 802. The Eighth Circuit's reading of the statutory language therefore deprives the explicit reference to section 802 of meaning when applied to convictions for paraphernalia possession. *See Rojas v. Att'y Gen.*, 728 F.3d 203, 209 (8th Cir. 2013) (en banc) ("[S]uch a result would violate the cardinal principle that we do not cripple statutes by rendering words therein superfluous, as the Department's reading would have us do to the 'as defined' parenthetical."); *Ransom v. FIA Card Servs., N.A.*, 131 S. Ct. 716, 724 (2011) ("[W]e must give effect to every word of a statute wherever possible.") (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004)).

The Eighth Circuit arrives at its holding by reading "relating to" to eliminate the requirement that the conviction be connected to a section-802 substance,

asserting that so long as a violation of the State law *could* relate to section-802 substances, all convictions under that law "relat[e] to" a section-802 substance. While the phrase "relating to" may be broad, it cannot do the work the Eighth Circuit assigns. *See Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995) ("related to," while broad, "cannot be limitless"). The phrase "relating to" functions in this statute only as a term that connects the state law crimes with the federal definition of what counts as a controlled substance. And this is how the BIA historically has applied the phrase. *See, e.g.*, *Matter of N-*, 6 I. & N. Dec. 557, 561 (B.I.A., A.G. 1955) (conviction of a conspiracy is a violation of a law relating to illicit trafficking in narcotics because object of the conspiracy involves trafficking); *Matter of Schunk*, 14 I. & N. Dec. 101, 102-03 (B.I.A. 1972) (conviction for being in a room where narcotics are smoked is not related to illicit trafficking). The Eighth Circuit's reading of "relating to" cannot overcome Congress's requirement that the conviction relate to a section-802 substance.

B. Section 1227(a)(2)(B)(i) requires the categorical approach and includes the element of a federally controlled substance.

1. The plain text requires the use of the categorical approach.

When the INA ties immigration consequences to criminal convictions, courts use the categorical approach to determine whether the conviction matches the requirements of the federal statute. *Moncrieffe*, 133 S. Ct. at 1684; *see also* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L.

Rev. 1669, 1688-1702, 1749-60 (describing historical development of the categorical approach and collecting cases). Under the categorical approach, either all convictions for a particular state offense fall within the generic federal definition or none of them does, as determined by looking at whether "the state statute defining the crime of conviction categorically fits within" an offense listed in the INA. *Moncrieffe*, 133 S. Ct. at 1684 (quotation marks omitted). The categorical approach asks "what offense the noncitizen was 'convicted' of, not what acts he committed." *Id.* at 1685 (citation omitted). Courts must "presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Id.* at 1684 (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)). The elements of the crime of conviction establish this minimum conduct. *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013).

A state offense matches the described federal removal charge "only if a conviction of the state offense *necessarily* involved ... facts equating to the generic federal offense." *Moncrieffe*, 133 S. Ct. at 1684 (quotation marks and brackets omitted) (emphasis added). If the elements of the crime do not necessarily establish conduct that fits within the federal description, the state offense is overinclusive and the conviction does not match the federal definition. *Descamps*, 133 S. Ct. at 2283.

Where the state statute is "divisible"—meaning it "lists multiple, alternative elements, and so effectively creates several . . . different crimes," and "one statutory phrase correspond[s] to the generic crime and another

[does] not," courts may use a modified categorical approach. *Descamps*, 133 S. Ct. at 2284-86 (citation and quotation marks omitted). Under this approach, a court consults documents in the record of conviction only "to determine which statutory phrase was the basis for the conviction." *Id.* at 2285 (citation omitted). The place of the modified categorical approach is limited: "It helps effectuate the categorical analysis when a divisible statute, listing potential offense elements in the alternative, renders opaque which element played a part in the defendant's conviction." *Id.* at 2283. Once the applicable portion of a divisible statute is identified, it is assessed categorically in the usual manner to determine whether the minimum conduct necessary to satisfy its elements corresponds to the generic federal offense. *Id.* at 2285; *Matter of S--*, 2 I. & N. Dec. 353, 357 (B.I.A., A.G. 1945).

Section 1227(a)(2)(B)(i) classifies deportability based on convictions and therefore provides "the relevant statutory hook" for the categorical approach to apply. *Moncrieffe*, 133 S. Ct. at 1685 (citation omitted); *compare* 8 U.S.C. § 1227(a)(2)(B)(ii) (no conviction required). The BIA has recently applied the categorical approach to a similar removal ground. *Matter of Chairez-Castrejon*, 26 I. & N. Dec. 349, 355-56 (B.I.A. 2014) (analyzing 8 U.S.C. § 1227(a)(2)(C)). Historically, the Board has taken the same approach with conviction-based deportation charges for controlled substances. *See e.g. Matter of Martinez-Gomez*, 14 I. & N. Dec. 104, 105 (B.I.A. 1972) (taking the statute "at its minimum"); *Matter of B-----*, 5 I. & N. Dec. 479, 481 (B.I.A. 1953) (contrasting conviction-based deportation ground with an immigration charge requiring only a "reason to believe"). Against this backdrop and

throughout its many amendments to the controlled substance deportation charge, Congress has maintained the requirement of a conviction. *See, e.g.*, Act of February 18, 1931, 46 Stat. 1171, 8 U.S.C. § 156a; Immigration and Nationality Act of 1952, Pub. L. 82-414, § 241(a)(11), 66 Stat. 163, 8 U.S.C. § 1251(a)(11); Anti-Drug Abuse Act of 1986, Pub. L. 99-570, § 1751(b), 100 Stat. 3207, 8 U.S.C. § 1251(b); *see Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

The categorical approach has been applied in immigration law to promote its uniform, fair, and predictable administration in a streamlined manner. Immigration adjudicators, including officers evaluating a paper application, not just immigration judges engaged in an adversarial process, are ill-equipped to conduct mini-trials into the facts underlying a past criminal conviction. *See, e.g.*, *United States ex rel Mylius v. Uhl*, 210 F. 860, 863 (2d Cir. 1914); *Matter of Pichardo-Sufren*, 21 I. & N. Dec. 330, 335-36 (B.I.A. 1996) (holding that a factual inquiry into the conduct underlying a conviction "is inconsistent both with the streamlined adjudication that a deportation hearing is intended to provide and with the settled proposition that an Immigration Judge cannot adjudicate guilt or innocence").

By providing that a section-802 substance must be an element underlying a State conviction, the categorical approach ensures "a uniform Rule" for noncitizens whose convictions establish the same facts.

U.S. Const., art. I, § 8 ("Congress shall have Power To ... establish an uniform Rule of Naturalization"); *see, e.g.*, *Bustamonte-Barrera v. Gonzalez*, 447 F.3d 388, 399 (5th Cir. 2006) (citing "overarching constitutional interest in uniformity of federal immigration and naturalization laws"); *Gerbier v. Holmes*, 280 F.3d 297, 311 (3d Cir. 2002) (stating that "the policy favoring uniformity in the immigration context is rooted in the Constitution").

Any inquiry into the underlying facts of conviction is in direct conflict with the categorical approach and introduces unfairness into the process. Facts not established by the conviction are inherently nonessential and thus their presence in the record of conviction or other documents is a matter of chance. This inquiry would also open the door to relitigation of criminal issues that depend on the availability of witnesses and evidence long after the fact. *See Moncrieffe*, 133 S. Ct. at 1690. Determinations of deportability would be influenced by the ability to secure counsel and invest resources in locating and presenting this evidence.

The principles furthered by the categorical approach also have constitutional underpinnings. The approach allows defense attorneys to meet their Sixth Amendment obligations to advise noncitizen defendants about the immigration consequences of criminal convictions because those consequences are uniform and predictable, based only on the facts established by a conviction compared with the requirements of the immigration charge. *See Padilla v. Kentucky*, 559 U.S. 356 (2010); *see also* Das, *supra*, 1743-45 (discussing the role of the categorical approach

in ensuring compliance with *Padilla*). By pegging immigration consequences to the conviction rather than an immigration judge's assumptions about what the underlying conduct could have involved, the categorical approach enables defense counsel to anticipate the consequences of a given plea and gives defendants notice of those consequences. *See Padilla*, 559 U.S. at 360.

2. Section 1227(a)(2)(B)(i) requires a conviction to establish the element of a section-802 substance.

The federal removal ground defined in section 1227(a)(2)(B)(i) mandates that the "violation" for which the noncitizen is "convicted" be one "relating to a controlled substance (as defined in section 802)." If the conviction could relate to a substance controlled only by a State or foreign government, the noncitizen is not removable. The statutory structure reveals the questions to be asked under the categorical approach:

1. Section 1227(a) describes *classes* of aliens who are deportable.
2. Section 1227(a)(2) identifies those classes that are based on "*Criminal offenses*," which are broken down by type of offense.
3. Section 1227(a)(2)(B) covers "*Controlled Substances*" offenses.
4. Section 1227(a)(2)(B)(i) covers "*Conviction*[*s*]."
5. Congress then provided the specific *definition* of "controlled substance"—the one provided in section 802 of Title 21.

In full, the federal definition of the removal ground describes those elements required for a conviction to

trigger deportability in terms of (1) the acts: a violation, attempted violation, or a conspiracy; (2) the laws: State, federal, and foreign; and (3) the controlled substances: those defined in section 802. The violation, whether of federal, State, or foreign law, must necessarily relate to a federally defined "controlled substance" under section 802, not other substances of separate concern to State and foreign governments. *See Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme.").

That the conviction is defined by a section-802 substance provides the common characteristic that unifies these State, federal, and foreign convictions and makes this deportable class a class. "Congress knows that any resort to state law will implicate some disuniformity , but that is no reason to think Congress meant to allow the States to supplant its own classifications when it specifically constructed its immigration law to turn on them." *Lopez*, 549 U.S. at 60 (rejecting construction of aggravated felony that would allow the element of "felony" to be satisfied by the State's classification of the crime instead of the federal "felony" definition provided in the removal ground). To allow removal for a conviction that lacks a section-802 substance as an element, but rather is a violation related only to a substance a State or foreign government controls would read out the requirement Congress expressly provided through the phrase "as defined in." *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute." (Internal quotation marks omitted)).

3. *The BIA and the Eighth Circuit read the statute inconsistently with the categorical approach.*

Without statutory support, the BIA reads section 1227(a)(2)(B)(i) to simultaneously require one set of elements for paraphernalia convictions and a different set of elements for other types of convictions. But there can be only one generic federal definition of this congressionally supplied removal ground, not definitions that vary with the particular type of conduct covered by the state, federal, or foreign statute of conviction. The BIA has historically applied the categorical and modified categorical approaches to determine whether the substance, not just the conduct, involved in the conviction matched the federal definition of the removal ground, comparing either the State and federal definitions of the drugs covered or comparing the substance identified in the record of conviction with the removal charge. *Matter of Paulus*, 11 I. & N. Dec 274, 276 (B.I.A. 1965) (comparing California narcotic definition to federal "narcotic drug" definition); *Matter of McClendon*, 12 I. & N. Dec. 233, 234-35 (B.I.A. 1967) (concluding demerol conviction matched "narcotic drug"). It continues to apply this analysis to require a section-802 substance for violations involving "the possession of particular substances." *Martinez Espinoza*, 25 I. & N. Dec. at 121.

Without overruling these cases, the BIA reads the same federal removal ground in section 1227(a)(2)(B)(i) to require different elements for violations "involving other conduct associated with the drug trade in general." *Martinez Espinoza*, 25 I. & N. Dec. at 121. The BIA thus ignores the statutory reference to 21

U.S.C. § 802 when addressing what it calls "drug trade" convictions, classifying all paraphernalia offenses as deportable. *Id.* at 122.

The Eighth Circuit's decision is incompatible with the categorical approach as well. It deferred to the BIA's reading that every paraphernalia conviction satisfies the removal standard because these offenses relate to controlled substances generally, no matter if the particular conviction is untethered to a section-802 substance. App. 10-11 (stating that the statutory term "relating to" "reflects congressional intent to broaden the reach of the removal provision to include state *offenses* having 'a logical or causal connection' to federal controlled substances" such that *any* Kansas paraphernalia *conviction* categorically relates to a section-802 substance) (emphasis added).

This reading ties removability not to the minimum conduct established by a conviction but rather to the maximum conduct covered by the law, a concept antithetical to the categorical approach. In doing so, the Eighth Circuit drains the meaning from "conviction"—the term at the heart of the categorical approach. Under this approach, a noncitizen can be removed for a conviction of a violation only the State criminalizes involving substances only the State controls. Such a conviction would establish few uniform facts and not necessarily the ones Congress expressly required. Instead, an adjudicator would look to whether the State statute covers any conduct related to a section-802 substance, not (as under the categorical approach) whether the elements of the crime of conviction necessarily establish the facts encompassed in the federal definition. That analysis

disconnects the element of a federally controlled substance from the conduct established by a conviction. This result is fundamentally at odds with the categorical approach as this Court has described it. *Descamps*, 133 S. Ct. at 2283-86; *Moncrieffe*, 133 S. Ct. at 1684-86.

The Eighth Circuit's reading also undermines the uniformity the categorical approach promotes. Although "[d]ifferent state offenses will necessarily establish different facts" and not all offenses "will track the 'uniform' federal definition of the generic offense," the categorical approach "ensures that all defendants whose convictions establish the same facts will be treated consistently, and thus predictably, under federal law." *Moncrieffe*, 133 S. Ct. at 1693 n.11. States cannot have "free rein to define their criminal laws in a manner that would allow them to effectively usurp the federal government's authority to determine who is permitted to enter and live in this country. If a state decides to outlaw the distribution of jelly beans, then it would have no effect on one's immigration status to deal jelly beans, because it is not related to a controlled substance listed in the federal CSA." *Desai v. Mukasey*, 520 F.3d 762, 766 (7th Cir. 2008).

And if removability is contingent on the scope of the law, as the Eighth Circuit ruled, a noncitizen with a Kansas paraphernalia conviction that establishes possession of an instrument used to store a substance that may not be included in section 802 is treated the same as a noncitizen in a State where the paraphernalia conviction necessarily establishes a connection to a substance defined in section 802. In reverse, under the Eighth Circuit's reading, a

conviction for paraphernalia used in connection with salvia would be a removable violation in Kansas but conviction for sale of salvia to a minor in California, which is criminalized outside its definition of "controlled substance" and has no overlap with section 802's definition, would not support removability—even though both convictions relate only to a non-section-802 substance. Cal. Penal Code § 379 (prohibiting salvia sale to minors); Cal. Health & Safety Code § 11007 (excluding salvia from "controlled substance" definition); *see also Lopez*, 549 U.S. at 59 (discussing intolerable disparity in inclusion of some convictions and exclusion of others if removability varies with State classifications); *Taylor v. United States*, 495 U.S. 575, 590 (1990) (rejecting Eighth Circuit's rule that a federal sentencing enhancement for a "burglary" conviction depended on a State's burglary definition). Congress's repeated use of the term "conviction" reflects its intent to ensure the predictability and uniformity the categorical approach provides, not the opposite as the Eighth Circuit's rule ensures.

C. The Eighth Circuit's construction is atextual, fails to consider the statute as a whole, and leads to anomalous results.

1. Reading the federal removal ground so that "relating to a controlled substance" qualifies "law," not "conviction," is untethered to the text and statutory history and leads to illogical consequences. The Eighth Circuit deferred to the BIA's stance on crimes involving the drug trade in general, stating that statutes that prohibit conduct associated with section-802 substances alongside non-section-802 substances relate to section-802 substances. App. 10.

The Eighth Circuit's justification requires several atextual leaps. To find a textual source for the BIA's rule that convictions for crimes involving the "drug trade in general" need not involve a section-802 substance, the court required the State definition of "controlled substance" to have a near complete overlap with section 802's definition. App. 10; *see also* BIO 7-8. It relied on a State's adoption of the Uniform Controlled Substances Act as a proxy for this overlap. App. 10. The federal removal ground, however, says nothing about the drug trade in general or adoption of the Uniform Controlled Substances Act. And simply adopting the Uniform Controlled Substances Act does not prevent States from adding non-section-802 substances to whatever extent they decide.

If, as the Eighth Circuit contends, the federal removal ground turns on the degree of overlap in the substances controlled by the State and federal government, then immigration judges, the BIA, and reviewing courts must examine State and federal schedules in their entirety to determine whether the overlap justifies immigration consequences. The Eighth Circuit provides no guidance on how much "overlap" is enough. This subjective task is more daunting because it is connected to nothing in the statutory language. In contrast, the natural reading of the statute, in which the conviction is related to a section-802 substance, requires the simpler task of determining whether the conviction establishes that the substance involved is listed in section 802. In other words, immigration judges must make the comparison the statute requires and no more.

Further, if removal depends on whether a given State's schedule is more or less similar to section 802, the decision is divorced from the facts established by a conviction and is tied instead to legislative action outside the noncitizen's control. Under that regime, two noncitizens with convictions that establish conduct associated only with a State's list of controlled substances could face different immigration consequences if one was in a jurisdiction where the State's schedule sufficiently mimicked section 802 and the other was not. *See Judulang v. Holder*, 132 S. Ct. 476, 485 (2011) (rejecting Government's statutory construction because "[r]ather than considering factors that might be thought germane to the deportation decision, that policy hinges [discretionary relief] eligibility on an irrelevant comparison between statutory provisions").

If "a controlled substance (as defined in section 802 of Title 21)" qualifies "law" and is not an element required in the conviction itself, a conviction under a State or foreign law that includes only one section-802 substance and many non-section-802 substances would render a noncitizen removable even though most convictions under the State or foreign law could involve non-section-802 substances. For example, five provinces in India outlaw sale and consumption of alcohol. *No Drink for You? India's Dry States*, Full Stop India, http://www.fullstopindia.com/liquor-prohibited-a-list-of-dry-states-in-india. Japan outlaws certain over-the-counter inhalers and allergy medications, even with a prescription. American Citizen Services, Embassy of the United States, Tokyo, Japan, http://japan.usembassy.gov/e/acs/tacs-medimport.html. The United Arab Emirates bans

possession or use of poppy seeds, even in baked goods. United Arab Emirates: Quick Facts, U.S. Dept. of State, Bureau of Consular Affairs, U.S. Passports & Int'l Travel, http://travel.state.gov/content/passports/english/country/united-arab-emirates.html. Removal for convictions relating to these substances is implicit in the Eighth Circuit's interpretation, and that cannot be what Congress intended.

The Government departs further from the statutory text by describing the Kansas statute as "prohibiting possession of tools *intended for* storing or consuming state-controlled substances" and thus prohibiting "tools of the drug trade in general." BIO 7-8. The Government reasons that because these tools can also be used "to serve the same function for substances that are federally controlled," the conviction falls within section 1227(a)(2)(B)(i). BIO 8. But this construction broadens the removal ground well beyond conduct justifying removability under federal law. Unlike the federal statute, Kansas's drug paraphernalia statute is not limited to tools *intended for* storing or consuming controlled substances. *Compare* Kan. Stat. Ann. § 21-5701(f) *with* 21 U.S.C. § 863(d). Nor is Kansas's paraphernalia crime restricted to acts involving distribution or trade in paraphernalia as the federal statute is. *Compare* 21 U.S.C. § 863(a) *with* Kan. Stat. Ann. § 21-5709(b)(2). Socks are not normally thought of as "tools of the drug trade in general" and their possession or use is not normally thought of as part of the drug trade. *See Lopez*, 549 U.S. at 53 (looking to the "everyday understanding" of the term "trafficking"). The Government's argument that "drug-paraphernalia statutes can be seen as proscribing 'conduct associated with the drug trade in general'" rings hollow in Kansas.

BIO 8 (quoting *Martinez Espinoza*, 25 I. & N. Dec. at 121).

2. The Eighth Circuit's approach also is inconsistent with the legislative purpose, as the evolution of the removal statute shows. In the predecessor to this statute, Congress specified both the substances justifying deportability and the acts supporting deportability. Conviction for violating "any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or ... any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of" identified substances would support deportation under the prior statute. 8 U.S.C. § 1251(a)(11) (1982).

In 1986, Congress amended the statute so that it no longer listed specific conduct that could support deportation, but Congress continued to define which drugs justify deportation by including the reference to 21 U.S.C. § 802. *See* Anti Drug Abuse Act of 1986, Pub. L. 99-570, 100 Stat. 3207, 3207-47, Oct. 27, 1986; Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208, § 305, 110 Stat. 3009 (1996) (redesignating statute as 1227(a)(2)(B)(i)). Congressional control over the substances to which the conviction must relate has remained constant.[1]

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[1] In the House debate over the 1986 amendments, the sponsor pointed out that the law had not kept up with "new types of drugs

Again, showing Congress's careful use of the definitions in the Controlled Substance Act to determine immigration consequences, in 1999 Congress amended the illicit trafficking ground of inadmissibility in 8 U.S.C. § 1182(a)(C) to expand the categories of substances encompassed by the ground to include "listed chemicals" not just "a controlled substance" as defined in 21 U.S.C. § 802. Intelligence Authorization Act for Fiscal Year 2000, Pub. L. 106-120, § 809, 113 Stat. 1606 (1999).

Congress has also demonstrated its ability to disconnect immigration law from the definitions provided by the Controlled Substances Act if it wants to do so. Section 212(a)(5) and section 241(a)(11) of the 1952 Act tied exclusion and deportation to addiction to "narcotic drug[s]"—a term defined by the Controlled Substance Act. 21 U.S.C. § 802(17). In 1990, Congress revised these grounds to eliminate that term and replace it with "drug abuser and addict" because it recognized that some drugs are addictive, harmful and dangerous, but not "narcotic drugs" under the federal

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and offenses" so as to include "convict[ion] of any drug offenses on the Federal Law." 132 Cong. Rec. H6700-1 (daily ed. Sept. 11, 1986) (Statement by Rep. Lungren). Another representative then said, "as I understand it, what the gentleman is doing is substituting language, Controlled Substances Act language, for specific substances in the act." *Id.* (Rep. Hughes) Representative Lungren agreed. *Id.* The Senate adopted this proposed language to amend both the inadmissibility and removability controlled-substances grounds in its bill. 132 Cong. Rec. S13461 (daily ed. Sept. 23, 1986). The Eighth Circuit asserted that "relating to" evidenced congressional intent to remove the requirement that a conviction relate to a substance the federal government controls, but this history shows just the opposite.

definition. H.R. Rep. No. 101-723, at 55 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6710, 6735; Immigration Act of 1990, Pub. L. 101-649, §§ 601(a), 602(a), 104 Stat. 4978 (1990).

D. Deference to the BIA is inappropriate.

1. The Eighth Circuit applied *Chevron* deference to the BIA's reading of the statute. App. 10. But the *Chevron* framework should not come into play at all where, as here, the interpretive question concerns proper application of the categorical approach. In past cases, this Court has determined for itself the elements that Congress requires for immigration consequences to attach to a conviction for purposes of categorical analysis. *E.g.*, *Moncrieffe*, 133 S. Ct. at 1684-85; *Kawashima v. Holder*, 132 S. Ct. 1166, 1171-72 (2012); *Carachuri-Rosendo*, 560 U.S. at 573-74; *Nijhawan v. Holder*, 557 U.S. 29, 33-34 (2009); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186 (2007); *Lopez*, 549 U.S. at 48; *Leocal*, 543 U.S. at 9. The same should hold true here. Even the BIA itself has recognized that its application of the categorical approach does not receive *Chevron* deference. *Matter of Chairez-Castrejon*, 26 I. & N. Dec. at 354 (citing *Descamps* for the proposition that federal courts do not defer to the BIA's application of the categorical approach).

2. Even if this Court were to find *Chevron* applicable, there is no room for agency interpretation because Congress's intent is unambiguous. In assessing ambiguity, this Court does not "confine itself to examining a particular statutory provision in isolation." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). Instead, the Court applies traditional tools of construction, examining both the

text of a provision and its operation within the structure of the larger statute to identify the provision's meaning as part of a "symmetrical and coherent regulatory scheme." *Id.* at 133. While not necessary here, the Court may also look to legislative history and the "nature of the question" presented to determine whether a statute is ambiguous. *Id.* at 134, 159.

Here this evidence of congressional intent is powerful. There is (i) the plain text of the ground of removal tying deportability to section-802 controlled substances (and excepting minor marijuana possession), (ii) the language Congress carefully used to attach consequences for substances beyond those defined as controlled substances in section 802 when it wished to do so elsewhere in Title 8, (iii) the categorical approach Congress has followed for over a century to limit grounds of deportability based on criminal convictions, and (iv) the incoherent results the BIA's construction produces. These factors dictate that removal must be limited to convictions that are related to controlled substances actually "defined in section 802 of Title 21." While this evidence of congressional intent is more than sufficient to establish that the statute is unambiguous, it is reinforced by the legislative history showing Congress has always retained legislative control over which substances warrant deportability. In sum, it is not plausible that Congress would intend lifetime banishment of long-term residents for minor convictions that have no specific tie to any federally proscribed conduct.

The Eighth Circuit did not consider this evidence, but instead focused narrowly on the isolated words

"relating to." Although these words can have broad meaning in some contexts, breadth is not synonymous with ambiguity, and they do not establish ambiguity here.[2]

3. Even if the statute were found ambiguous, the Board's construction is unreasonable and unpersuasive. The Board's rule in *Martinez Espinoza* describes convictions for paraphernalia possession as "conduct associated with the drug trade in general" and does not require that these convictions establish the element of a section-802 substance. *Martinez Espinoza*, 25 I. & N. Dec. at 121. This reading of Congress's removal ground is unreasonable and due no deference. The BIA has interpreted the same text to apply one way for possession and distribution offenses and another for paraphernalia offenses. *See supra* I.B.3.

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[2] Circuits have construed the plain meaning of "relating to" in immigration and other contexts. *See Rojas*, 728 F.3d at 217; *Coronado-Durazo v. INS*, 123 F.3d 1322, 1324 (9th Cir. 1997). *Barrome v. Att'y Gen.*, 687 F.3d 150 (3d Cir. 2012); *Rana v. Holder*, 654 F.3d 547, 550 (5th Cir. 2011). *Denis v. Att'y Gen.*, 633 F.3d 201, 208 (3d Cir. 2011) (8 U.S.C. § 1101(a)(43)(S)); *Vasquez v. Holder*, 602 F.3d 1003, 1011-12 (9th Cir. 2010) (8 U.S.C. § 1227(a)(1)(H)); *Evangelista v. Ashcroft*, 359 F.3d 145, 151 (2d Cir. 2004) (8 U.S.C. § 1101(a)(43)(M)); *Kamagate v. Ashcroft*, 385 F.3d 144, 154 (2d Cir. 2004) (8 U.S.C. § 1101(a)(43)(R)); *Albillo-Figueroa v. INS*, 221 F.3d 1070, 1073-74 (9th Cir. 2000) (8 U.S.C. § 1101(a)(43)(R)).

The BIA has also applied the plain meaning of "relating to." *See, e.g.*, *Matter of Oppedisano*, 26 I. & N. Dec. 202, 206 (B.I.A. 2013) (8 U.S.C. § 1101(a)(43)(E)); *Matter of Gruenangerl*, 25 I. & N. Dec. 351, 355-56 (B.I.A. 2010) (8 U.S.C. § 1101(a)(43)(R)); *In re Ruiz-Romero*, 22 I. & N. Dec. 486, 489-90 (B.I.A. 1999) (8 U.S.C. § 1101(a)(43)(N); *In re Batista-Hernandez*, 21 I. & N. Dec. 955, 961 (B.I.A. 1997) (8 U.S.C. §§ 1251(a)(2)(B)(i), 1101(a)(43)(S)); *In re Alvarado-Alvino*, 22 I. & N. Dec. 718, 720 (B.I.A. 1999) (8 U.S.C. § 1101(a)(43)(N)).

Consequently, a noncitizen is not deportable for a Kansas conviction of distributing salvia or TFMPP (because they are not section-802 substances), but is deportable for a Kansas conviction of having salvia or TFMPP in his sock (because the sock is paraphernalia and associated with the drug trade in general). The Board's reading similarly could result in removal of a noncitizen based on a poppy seed or alcohol-related conviction in a foreign country.

The Board created these absurd results by inventing a "drug trade" exception in *Martinez Espinoza*, 25 I. & N. Dec. at 121, with no basis in text or precedent. The case on which *Martinez Espinoza* relies, *Martinez-Gomez*, 14 I. & N. Dec. 104, provides no support. That case involved only a comparison of the activity prohibited by the California law and the activity Congress described in the deportation ground. *Id.* at 105. The decision reflects no claim that the substances defined by the California law did not match those specified in the federal deportation ground. *Id.* at 104-05. The case simply did not consider this correspondence, nor did it call into question *Paulus*, which held that the substances established by the conviction must match Congress's definition. The Board has never explained why paraphernalia possession convictions constitute "drug trade," but drug possession and distribution apparently do not.

The Board's reading is also unreasonable because it would remove noncitizens for low-level offenses similar to the convictions Congress explicitly exempted. Nearly every State that criminalizes paraphernalia possession to store, contain, or conceal a controlled

substance punishes it akin to a federal misdemeanor.[3] Nineteen states, along with the federal government, do not criminalize the conduct for which Mellouli was convicted.[4] Of the thirty-two jurisdictions that

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[3] Alabama (Ala. Code §§ 13a-5-7(a)(1), 13a-12-260(c)); Arizona (Ariz. Rev. Stat. §§ 13-3415(A), 13-604(A) (allows judges to treat paraphernalia offenses as a misdemeanor); Arkansas (Ark. Code Ann. §§ 5-4-401(b)(1), 5-64-443(a)(1)); Colorado (Colo. Rev. Stat. §§ 18-18-428(2), 18-18-426); Connecticut (Conn. Gen. Stat. §§ 21a-267(a), 53a-36); Delaware (Del. Code Ann. tit. 11, § 4206(b), tit. 16, §§ 4771, 4774(a)); Florida (Fla. Stat. §§ 775.082(4)(a), 893.147(1)); Georgia (Ga. Code Ann. §§ 16-13-32.2, 17-10-3(a)); Idaho (Idaho Code Ann. § 37-2734A); Kansas (Kan. Stat. Ann. §§ 21-5709(b)(2), (e)(3), 21-6602(a)(1)); Kentucky (Ky. Rev. Stat. Ann. §§ 218A.500(5), 532.090(1)); Louisiana (La. Rev. Stat. Ann. §§ 40:1023(c), 40:1025); Maryland (Md. Crim. Law § 5-619(c)(2)); Mississippi (Miss. Code Ann. § 41-29-139(d)(1)); Missouri (Mo. Rev. Stat. §§ 195.233(2), 558.011(1)(5)); Montana (Mont. Code Ann. § 45-10-103); Nevada (Nev. Rev. Stat. §§ 193.150, 453.566); New Jersey (N.J. Stat. Ann. §§ 2C:36-2, 2C:43-8); New Mexico (N.M. Stat. Ann. § 30-31-25.1(A), (C)); North Carolina (N.C. Gen. Stat. §§ 15A-1340.23(c); 90-113.22(b)); North Dakota (N.D. Cent. Code §§ 12.1-32-01(5), 19-03.4-03); Ohio (Ohio Rev. Code Ann. §§ 2925.14(F)(1), 2929.24(A)(4)); Oklahoma (Okla. Stat. tit. 63, § 2-405(C), (E)(1)); Pennsylvania (35 Pa. Cons. Stat. § 780-113(a)(32), (i)); South Dakota (S.D. Codified Laws §§ 22-6-2(2), 22-42A-3); Tennessee (Tenn. Code Ann. §§ 39-17-425(a), 40-35-111(e)(1)); Texas (Tex. Health & Safety Code Ann. § 481.125(a), (d), Tex. Penal Code Ann. §12.23); Utah (Utah Code Ann. § 58-37a-5(1), 76-3-204(2)); Washington (Wash. Rev. Code §§ 9.92.030, 69.50.412(1)); Wisconsin (Wis. Stat. § 961.573(1)). Washington D.C. also limits punishment for drug paraphernalia possession to 30 days. D.C. Code § 48-1103(a).

[4] Four of those states do not criminalize paraphernalia-related conduct. Alaska (*see* Alaska Stat. § 11.71 *et seq.*); Maine (Me. Rev. Stat. tit. 17, § 1111-A(4-B) (civil penalty); Oregon (Or. Rev. Stat. § 475.565) (civil fine); South Carolina (S.C. Code Ann. § 44-53-391)

criminalize conduct that would encompass Mellouli's conviction, twenty-five treat the crime no more severely than simple possession of marijuana[5]—an offense

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(civil penalty). Another fifteen, plus the federal government, only criminalize paraphernalia-related offenses that require minimum conduct more serious than Mellouli's offense. Federal government (Controlled Substance Act, 21 U.S.C. § 863); California (Cal. Health & Safety Code § 11364.7); Illinois (720 Ill. Comp. Stat. 600/3.5); Indiana (Ind. Code. § 35-48-4-8.3); Iowa (Iowa Code § 124.414); Massachusetts (Mass. Gen. Laws ch. 94C, §32I); Michigan (Mich. Comp. Laws § 333.7453); Minnesota (Minn. Stat. § 152.01(subd. 18(a), 152.092); Nebraska (Neb. Rev. Stat. § 28-441); New Hampshire (N.H. Rev. Stat. Ann. § 318-B:2(II)); New York (N.Y. Penal Law § 220.50); Rhode Island (R.I. Gen. Laws § 21-28.5-2); Vermont (Vt. Stat. Ann. tit. 18, § 4476); Virginia (Va. Code Ann. §§ 18.2-265.3, 54.1-3466); West Virginia (W. Va. Code. § 60A-4-403a) (limiting criminal liability to unlicensed paraphernalia businesses); Wyoming (Wyo. Stat. Ann. § 35-7-1056).

[5] Alabama (Ala. Code §§ 13a-12-214, 13a-12-260(c)); Arizona (Ariz. Rev. Stat. §§ 13-3405(B)(1); 13-3415(A)); Arkansas (Ark. Code Ann. §§ 5-64-419(b)(5)(A), 5-64-443(a)(1)); Colorado (Colo. Rev. Stat. §§ 18-18-406(5)(a)(I), 18-18-428(2)); Connecticut (Conn. Gen. Stat. §§ 53a-36, 53a-42, 21a-267, 21a-279; Delaware (Del. Code Ann. tit. 16, §§ 4763(b), 4774(a)); Florida (Fla. Stat. §§ 893.13(6)(b), 893.147(1)); Georgia (Ga. Code Ann. §§ 16-13-2(b), 16-13-32.2); Idaho (Idaho Code Ann. §§ 37-2732(c)(3), 37-2734A); Kansas (Kan. Stat. Ann. §§ 21-5706(c)(2)(A), 21-5709(e)(3)); Louisiana (La. Rev. Stat. Ann. §§ 40:966(E), 40:1025); Maryland (Md. Crim. Law §§ 5-601(c)(2)(i), 5-619(c)(2)); Missouri (Mo. Rev. Stat. §§ 195.202(3), 195.233(2)); Montana (Mont. Code Ann. §§ 45-9-102(2), 45-10-103); New Jersey (N.J. Stat. Ann. §§ 2C:36-2, 2C:43-8, 2C:35-10(a)(4)); New Mexico (N.M. Stat. Ann. §§ 30-31-25.1, 30-31-23); North Carolina (N.C. Gen. Stat. §§ 90-113.22, 90-95); North Dakota (N.D. Cent. Code §§ 19-03.1-23(7), 19-03.4-03); Oklahoma (Okla. Stat. tit. 63, §§ 2-402(B)(2), 2-405(C), (E)(1)); South Dakota (S.D. Codified Laws §§ 22-42-6, 22-42A-3, 22-6-2); Tennessee (Tenn. Code Ann.

Congress explicitly excluded from the controlled-substance ground of removal. Similarly, of the sixteen jurisdictions that limit paraphernalia offenses to conduct more serious than Mellouli's offense, eight punish paraphernalia offenses no more severely than simple possession of marijuana,[6] and thirteen make paraphernalia offenses punishable by no more than one year's incarceration.[7] Congress exempted only one offense, low-level marijuana possession, from the reach of section 1227(a)(2)(B)(i), but its reference to section

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§§ 39-17-418(c)(1), 39-17-425(a)); Texas (Tex. Health & Safety Code Ann. §§ 481.121(b), 481.125(d)); Utah (Utah Code Ann. § 58-37-8(2)(d), 58-37a-5(1)); Washington (Wash. Rev. Code §§ 69.50.4014, 69.50.412(1)); Wisconsin (Wis. Stat. §§ 961.41(3g)(b), 961.573, 939.61(2)).

[6] California (Cal. Health & Safety Code §§ 11357(c), 11364.7(a), Cal. Penal Code § 19); Illinois (720 Ill. Comp. Stat. 550/4(c), 600/3.5); Iowa (Iowa Code §§ 124.401(5), 124.414, 903.1(1)(a), (b)); Michigan (Mich. Comp. Laws §§ 333.7403(2)(d), 333.7453, 333.7455); Minnesota (Minn. Stat. §§ 152.027(subd. 4(a), 152.092); Nebraska (Neb. Rev. Stat. §§ 28-416(13), 28-441); New Hampshire (N.H. Rev. Stat. Ann. 318-B:26(II)(d), 318-B:26(III)(c)); Wyoming (Wyo. Stat. Ann. §§ 35-7-1031(c)(i)(A), 35-7-1056).

[7] California (Cal. Health & Safety Code §§ 11357, 11364.7); Illinois (720 Ill. Comp. Stat. 600/3.5, 730 Ill. Comp. Stat. 5/5-1-14); Indiana (Ind. Code. §§ 35-48-4-8.3, 35-50-3-2); Iowa (Iowa Code §§ 903.1(1)(a), 124.414); Michigan (Mich. Comp. Laws § 333.7453 (no arrest if cease selling paraphernalia), 333.7455(1)); Minnesota (Minn. Stat. §§ 152.092, 609.02(subd.4(a))); Nebraska (Neb. Rev. Stat. §§ 28-441, 29-436); New Hampshire (N.H. Rev. Stat. Ann. §§ 318-B:2(II), 318-B:26(III)(c), 651:2(II)(c)); New York (N.Y. Penal Law §§ 70.15(1), 220.50); Vermont (Vt. Stat. Ann. tit. 18, § 4476); Virginia (Va. Code Ann. §§ 18.2-11(a), 18.2-265.3(A), 54.1-3466); West Virginia (W. Va. Code. § 60A-4-403a) (paraphernalia-related businesses only); Wyoming (Wyo. Stat. Ann. § 35-7-1056).

802 effectively keeps some other kinds of minor drug offenses from having immigration consequences. The Eighth Circuit's approach opens the deportability door wider than Congress intended. Removing lawful permanent residents for convictions that are among the lowest level offenses, if they are crimes at all, is an unreasonable reading of the statute and deserves no deference.

II. Mellouli's statute of conviction is overinclusive, and its express terms establish a realistic probability of prosecution for conduct outside section 1227(a)(2)(B)(i).

The federal removal ground in section 1227(a)(2)(B)(i) requires that Mellouli's conviction relate to a section-802 substance for him to be deportable. When the categorical approach is applied, it is apparent that his paraphernalia conviction is insufficient for deportability. The minimum conduct required for conviction under the Kansas paraphernalia law does not necessarily relate to a section-802 substance because the paraphernalia could be used to store, contain, or conceal a substance only Kansas controls.

The Eighth Circuit has required more, and the Government has adopted its position. The Eighth Circuit determined that Kansas's statute was similar enough to section 802 because Kansas had adopted the Uniform Controlled Substances Act, deferring to the BIA on that assumption. App. 4, 10. The Government went further to argue that Mellouli's failure to show that Kansas has "obtained a meaningful number of convictions—or brought any prosecutions at all [for non-section-802 substances] would be fatal to

petitioner's claim" even if the Court construed section 1227(a)(2)(B)(i) to require the conviction, not the statute, to relate to a section-802 substance. BIO 7, 12. Engrafting a "realistic probability" requirement onto the analysis in this case is unsupported by federal law, assumes that the State will not prosecute crimes its own legislature has enacted, and eliminates the uniformity and fairness embodied in the categorical approach. Nonetheless, criminal court documents, statements by law enforcement, and news reports demonstrate that Kansas and other States prosecute conduct unrelated to section-802 substances.

A. The Kansas statute's explicit provisions demonstrate a realistic probability of prosecution for violations unrelated to section-802 substances.

Where a State statute explicitly covers substances excluded from section 802, the statute itself demonstrates a realistic probability of prosecution. Under *Moncrieffe*, "focus on the minimum conduct criminalized by the state statute is not an invitation to apply 'legal imagination' to the state offense; there must be 'a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.'" 133 S. Ct. at 1684-85 (quoting *Duenas-Alvarez* 549 U.S. at 193). But when the State law is facially broader than the federal statute, the "realistic probability" inquiry is satisfied because no "legal imagination" is required to conclude that States will prosecute the crimes expressly defined in their own laws.

The "realistic probability" test applies only where the reach of the State law is unclear and in dispute. *Duenas-Alvarez* required deciding whether the federal aggravated felony definition of theft includes a California aiding and abetting conviction—an inquiry inhibited by lack of clarity in California law. 549 U.S. at 189. Duenas-Alvarez's argument was based on California's "natural and probable consequences" doctrine, and Duenas-Alvarez offered a hypothetical as to how it might apply to conduct outside the federal generic theft definition. *Duenas-Alvarez*, 549 U.S. at 190-91. The Government countered that Duenas-Alvarez should not be permitted to use "a mere theoretical possibility" to defeat the categorical approach. Reply Br. at 15, *Duenas-Alvarez*, 549 U.S. 183 (No. 05-1629) 2006 WL 3414279 (2006). *Duenas-Alvarez* introduced the requirement to show a "realistic probability" of prosecution as a backstop for the categorical approach, but only where the contours of the State law are unclear and the statute's reach is disputed. 549 U.S. at 191-93; *see also Moncrieffe*, 133 S. Ct. at 1693 (discussing absence of explicit antique firearms exception in state law). When a State statute expressly applies to conduct falling outside the scope of the generic federal definition, the statute's overinclusiveness is clear on its face, and no more is needed. Indeed, the categorical approach has historically honored a State statute's own terms because they are fundamental to the elements-based comparison the approach requires. Neither *Duenas-Alvarez* nor *Moncrieffe* says otherwise.

Several circuits agree that when the State statute's terms encompass conduct beyond that in federal law, a realistic probability of prosecution is established.

Ramos v. Att'y Gen., 709 F.3d 1066, 1071-72 (11th Cir. 2013) (holding that *Duenas-Alvarez* does not require showing that a State would prosecute conduct outside the federal statute "when the statutory language itself, rather than 'the application of legal imagination' to that language, creates the 'realistic probability' that a state would apply the statute to conduct beyond the generic definition"); *Jean-Louis v. Att'y Gen.*, 582 F.3d 462, 481 (3d Cir. 2009) (declining to import the "realistic probability" test into the context of crimes involving moral turpitude because the terms of the State statute required "no application of 'legal imagination.'"); *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc) ("Where, as here, a state statute explicitly defines a crime more broadly than the generic definition, no 'legal imagination' is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime." (citation omitted)); *Mendieta-Robles v. Gonzales*, 226 Fed. App'x 564, 572 (6th Cir. 2007) (refusing to apply *Duenas-Alvarez* because the statute's "clear language . . . expressly and unequivocally" includes conduct outside the scope of the generic definition); *see also United States v. Aparicio-Soria*, 740 F.3d 152, 158 (4th Cir. 2014) (en banc) (refusing to hypothesize about a "realistic probability" because the inquiry ends when the statutory elements are clear).

The Government's position ignores the language of the Kansas statutes and these authorities. The Kansas drug paraphernalia statute covers the use of equipment and material to store, conceal, or contain any substance the State controls, which at the time of Mellouli's conviction included at least nine substances excluded

from section 802's controlled substances definition. The Kansas statute leaves no room for the dispute present in *Duenas-Alvarez*. Nor does Mellouli posit any hypothetical set of facts. He claims only that the statute encompasses the precise conduct it says it encompasses. Mellouli's argument fits within the framework of the categorical approach and its "long pedigree in our Nation's immigration law." *Moncrieffe*, 133 S. Ct at 1685.

According to the Government, the legislature's amendments to the Kansas statutes to control additional substances are insufficient to show that the State will in fact enforce the laws it passed. But discrepancies between State and federal schedules are not happenstance. They reflect considered policy decisions by State and federal governments—decisions about the need to regulate behavior through criminal laws; in other words, decisions to make certain conduct subject to prosecution. While the Department of Justice's Drug Enforcement Agency is aware that some States control jimson weed and salvia, the Attorney General has continued to exclude them from the federal list of controlled substances. Drug Enforcement Administration, *Jimson Weed (Datura stramonium)* (Oct. 2013), *available at* http://www.deadiversion.usdoj.gov/drug_chem_info/jimson_w.pdf; Drug Enforcement Administration, *Salvia Divinorum and Salvinorin* (Jan. 2013) http://www.deadiversion.usdoj.gov/drug_chem_info/salvia_d.pdf.

In contrast, Kansas prosecutors lobbied for adding jimson weed and salvia to the State's controlled substances schedules, then heavily publicized the amendments to other prosecutors, judges, and law enforcement associations. The President of the Kansas

County and District Attorney Association championed the amendment, testifying in support of the additions to Kansas's list of controlled substances and submitting a formal letter urging "proactive" action. Kansas County & District Attorneys Association, Testimony for SB 481, Kansas House Judiciary Committee, Attachment 10 (March 17, 2008); Minutes of the House Judiciary Committee, 1-2, Mar. 17, 2008, *available at* http://www.kslegislature.org/li/m/historical/committees/minutes/07_08/house/hjud/20080317hJud.pdf. The legislative change was then communicated throughout Kansas's criminal justice system. *See also* Michael O'Neal, *2008 Legislative Changes of Interest to County and District Attorneys*, 5 Kan. Prosecutor Summer/Fall 2008, at 5, *available at* http://www.kcdaa.org/Resources/Documents/KSProsecutor-Fall08.pdf; *Adding Certain Hallucinogenics as Controlled Substances*, 44 The Verdict: The Official Publication of the Kansas Municipal Judges Association Summer 2008, at 9-10, *available at* http://www.kmja.org/wp-content/uploads/2010/09/VerdictSummer2008.pdf; Bill Reid, *Two Additions to List of Schedule I Substances*, 10 Kan. Crim. Just. Info. Sys. (KCJIS) News May 2008, at 5, *available at* http://www.access kansas.org/kbi/info/docs/pdf/KN200805.pdf. Shortly after Kansas passed this bill, Kansas officials confiscated salvia, educated shop owners that they could no longer sell the drug, created an amnesty program for salvia purchased before the law went into effect, and promised to search all stores to ensure that they no longer sell the substance. Rachel Davis, *Police Warn of Drug*, Garden City Telegram, May 6, 2008, at A1, A5.

As another example, in 2002, the Attorney General added TFMPP to the federal schedule I on an

emergency basis. *See* 67 Fed. Reg. 59161-01, 59161 (Sept. 20, 2002).[8] The Attorney General allowed this temporary scheduling to expire, 69 Fed. Reg. 12794-01, 12795 (Mar. 18, 2004), after the Drug Enforcement Administration reviewed the statutory factors including relative potential for abuse. *Id.* Yet in 2010, the Kansas Board of Pharmacy, which is required to consider the same criteria for designating a controlled substance as contained in the federal law, recommended that the Kansas legislature add TFMPP to its schedule I, which it did. *Compare* Kan. Stat. Ann. § 65-4102 *with* 21 U.S.C. § 811(c); Legislative Research Dep't, Supp. Note on H.B. 2411, 2010, *available at* http://www.kansas.gov/government/legislative/supplemental/2010/SN2411.pdf; Kansas Register Vol. 29 No. 11 at 341-42 (Mar. 18, 2010).

Under the Government's view, the Court must presume that Kansas does not prosecute conduct involving the non-section-802 substances the legislature added to the State's statutory definitions and offenses. BIO at 12. Such a presumption would denigrate the sovereignty of these States in passing their laws and the independent judgment of their prosecutors in enforcing them. *See Carachuri-Rosendo*, 560 U.S. at 579-80.

Because Kansas controls substances the federal government does not and criminalizes possession of paraphernalia associated with those substances, the

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[8] TFMPP is described as creating a hallucinogenic effect. Drug Enforcement Administration, *1-[3-(Trifluoro-methyl)-phenyl]piperazine* (Aug. 2013) http://www.deadiversion.usdoj.gov/drug_chem_info/tfmpp.pdf.

statute taken at its minimum does not necessarily involve a violation relating to a section-802 substance. *Moncrieffe*, 133 S. Ct. at 1684. Mellouli's conviction thus does not match the federal definition of the removal ground.

B. Requiring proof of prosecutions for conduct expressly covered by the Kansas statute subverts the categorical approach and is inherently unfair.

The "realistic probability" requirement would eviscerate the streamlined assessments the categorical approach allows and with it the fairness, predictability, and uniformity the approach promotes. Applying this rule to Mellouli demonstrates the problems.

Possession of drug paraphernalia is a misdemeanor in Kansas, as it is in most States. Kan. Stat. Ann. § 21-5709(e)(3); *infra*, nn.3 & 7 and accompanying text. As with Mellouli, these misdemeanor charges are often resolved in pleas involving no jail time. J.A. 25, 27-33; *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (stating that 97% of federal convictions and 94% of state convictions are the result of guilty pleas). With no sentence of confinement and few consequences for a misdemeanor conviction outside the immigration context, there is little incentive for defendants to appeal their convictions.

Further, a noncitizen charged with removability under section 1227(a)(2)(B)(i) is subject to mandatory detention. 8 U.S.C. § 1226(c)(1)(B). Nearly eighty-five percent of detained noncitizens have no attorney in their immigration hearings. Amer. Bar Ass'n, *Reforming the Immigration System: Proposals to*

Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases 5-8 (2010). These noncitizens would bear the burden to show a realistic probability of prosecution by trying to locate criminal records held only by district and municipal courts, which are not available in searchable databases (when States keep relevant, centralized records at all) and often do not contain the information they need. And they must do so without help from counsel and with limited ability to communicate with courts or public defender offices.

Not only is this burden on the noncitizen unfair, it fundamentally undermines the function and benefits of the categorical approach. The categorical approach allows immigration judges to determine the immigration implications of a conviction from the fact of conviction alone by restricting the remaining analysis to comparing the minimum conduct established by the conviction with the requirements of the immigration statute. *Moncrieffe*, 133 S. Ct. at 1685-86. If the minimum conduct does not necessarily satisfy the requirements of the immigration provision, those consequences do not attach. This streamlined assessment of immigration consequences is undone by the Government's elevation of realistic probability to a blanket evidentiary burden on the noncitizen to show actual prosecutions in every case regardless of the statute's express reach.

The Government argues that the Kansas drug paraphernalia statute is overinclusive only if Petitioner can show "a meaningful number of convictions" for non-federal substances. BIO at 12. Under the Government's approach, instead of assessing only the

facts established by a conviction, the immigration judge must also determine the reliability, weight, and sufficiency of the additional evidence of prosecutions, while also considering any arguments by the parties that are raised with this new procedural requirement. Streamlined review would become impossible.

And with the loss of streamlined review so goes predictability and uniformity. The consequences of a criminal conviction would depend not on the crime's elements but rather on the accessibility of criminal complaints and plea agreements; the noncitizen's ability to secure counsel to find this evidence; the recency of the non-section-802 addition; and the fortuity that examples of overbroad prosecutions are publicized or known by a particular immigration judge. The logistics required to identify example prosecutions demonstrates the unfairness and arbitrariness that flow from this requirement.

C. Criminal complaints, docket entries, and news reports demonstrate that Kansas and other States prosecute offenses involving non-section-802 substances.

Evidence that States prosecute paraphernalia offenses involving non-section-802 substances is difficult to come by because so many cases are resolved through plea agreements, appeals are not filed, and records are not readily accessible. Kansas's criminal courts do not maintain conviction records that are searchable by substance or offense; only two of Kansas's 105 county courts make their criminal dockets available through electronic databases managed by West. Westlaw Database Directory, Main Directory, Dockets, Kansas State Courts, *available at*

directory.westlaw.com. Consequently, Kansas criminal records can be retrieved only through a state-law Open Records Request or with the help of local attorneys. *See* Kan. Jud. Branch, *A Guide to Judicial Branch Open Records Requests*, http://www.kscourts.org/rules-procedures-forms/open-records-procedures/default.asp. And the felony and misdemeanor conviction records that can be obtained may not identify the substance involved because the journal entry on the conviction may be incomplete or not require that information. *See* Kan. Sentencing Comm'n, Select Drug Statutes Data (Sept. 3, 2014) (noting that the Sentencing Commission tracks only felony convictions; started tracking the substance associated with conviction in 2014; and only tracks certain substances).[9]

Nonetheless, there is at least one example from Saline County District Court of a Kansas prosecution for selling, delivering, or distributing an analog of 1-Pentyl-3(1-naphthoyl)indole, known as JWH-018.[10] The substance was not federally controlled at the time the conduct underlying the charge allegedly occurred. Temporary Placement of Five Synthetic Cannabinoids into Schedule 1, 76 Fed. Reg. 11,075-78 (Mar. 1, 2011). The defendant could thus be prosecuted only under Kansas's drug laws. The data from the Kansas Sentencing Commission reflects two 2014 convictions for "K2," which is the colloquial name for synthetic

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[9] Counsel has proposed to lodge this document with the Clerk under Supreme Court Rule 32.3.

[10] No. 11CR212 (Feb 18, 2011) (alleging violations of Kan. Stat. Ann. § 21-36a05(a)(4) (2009) (renumbered Kan. Stat. Ann. § 21-5706)).

cannabinoids and includes JWH-018.[11] It is likely Kansas prosecuted conduct associated with K2 before it was included in the federal definition, but Kansas began keeping these records only in 2014. Doubtless there are other such Kansas examples but records do not exist or are not retrievable.

In States that do provide docket information to electronic databases, there is evidence of reasonable probability of prosecutions for non-section-802 substances. For example, docket records reveal prosecution for TFMPP possession in Florida, *State v. Daniels*, No. 42-2013-CF-002883 (Fla. Marion Cnty. Ct. filed Sept. 3, 2013), ephedrine/pseudoephedrine possession in Michigan, *People v. Biel*, No. 2012240281FH (Mich. Cir. Ct., Oakland Cnty., Feb. 15, 2012), and a criminal complaint filed in Florida for propylhexedrine possession, *State v. Cook*, No. 42-2006-CF-002579 (Fla. Marion Cnty. Ct. filed June 27, 2006). Electronic database searches produced an Anchorage, Alaska prosecution for possession/use of cannabinoid (spice). *Anchorage v. Russell*, No. 11-2523 (Alaska Dist. Ct. Anchorage filed Mar. 5, 2011)) (prohibited since Dec. 7, 2010, A.O. 2010-87(s)). The offense occurred just three days after the federal government added the substances to its list but there are likely other prosecutions beginning in 2010 when the ordinance was passed. A.O. No. 2010-87(S). Washington State has prosecuted multiple cases of possession or attempted possession of ephedrine or pseudoephedrine. *E.g.*, *State v. Dallas*, No. 05-1-00322-

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[11] Kan. Sentencing Comm'n, Select Drug Statutes Data; Drug Enforcement Admin., Drug Fact Sheet: K2 or Spice, *available at* www.justice.gov/dea/druginfo/drug_data_sheets/K2_Spice.pdf

1 (Wash. Sup. Ct. Benton Cnty., filed Mar. 7, 2005). Similar searches have revealed multiple ephedrine/pseudoephedrine prosecutions in Oklahoma. *E.g.*, *State v. Way*, No. CM-2001-529 (Okla. Dis. Ct. Canadian Cnty., filed July 11, 2001). Despite the paucity of reported cases, Iowa has an appellate decision involving salvia possession. *State v. Bushnell*, No. 13-0236, 2014 WL 970025, *1, n.2 (Iowa Ct. App. Mar. 12, 2014).

News reports indicate that other States have prosecuted offenses associated with the nine non-section-802 substances outlawed by Kansas at the time of Mellouli's prosecution. *See* Phil Davis, *Gloucester County Grand Jury Indicts Several on Drugs, Weapons Charges*, NJ. Com, May 2, 2013, www.nj.com/gloucester-county/index.ssf/2013/05/gloucester_county_grand_jury_i_50.html (reporting arrest for jimson weed possession); Paul Gable, *SWAT Drug Bust Nets Arrests of Seven Individuals in Shelbyville*, Shelbyville News, Nov. 9, 2013, *available at* http://www.shelbynews.com/news/article_4bf60f87-97f6-5bb3-ba72-8168e1c9 e1bf.html (Indiana arrest for possession of salvia, other substances, and paraphernalia); Jail Bookings, Stacey Pages Online, Mar. 24, 2014, http://www.staceypageonline.com/2014/03/24/jail-bookings-457/ (Indiana arrests on charges of salvia/synthetic cannabinoid and paraphernalia possession); *LCSO charges 3 with MJ, salvia / synthetic cannabinoid possession*, J.-Aff., July 31, 2012, www.journal-advocate. com/ci_21199104/lcso-charges-3-mj-salvia-synthetic-cannabinoid-possession (Colorado); *Police Blotter for April 27*, Lafayette J. & Courier, Apr. 27, 2014 (reporting Indiana arrests for possession and dealing salvia) *available at* www.jconline.com/story/news/crime/ 2014/04/25/crime-

blotter/8133221/; *Police: Smoke shop busted for marijuana, salvia, drug paraphernalia*, WHAS11.com, Jan. 26, 2011, www.whas11.com/news/local/Police-Smoke-shop-busted-for-marijuana-salvia-drug-paraphernalia-114671699.html (Kentucky); Phillip S. Smith, *North Dakota Man Facing Years in Prison After Buying Salvia Divinorum on eBay*, AlterNet.org, May 1, 2008, www.alternet.org /story/84158/north_dakota_man_facing_years_in_prison_after_buying_salvia_divinorum_on_ebay; *Salvia Case Tests Court System*, St. Joseph News Press, May 18, 2012, *available at* www.newspressnow.com/news/article_2556dc51-4ae8-5dbe-b685-37d109fb3d51.html?mode=jqm (Missouri).

An example from Massachusetts illustrates how far States can deviate from the federal schedules and prosecute associated conduct. Massachusetts includes all prescription drugs on its list of controlled substances. Mass. Gen. Laws ch. 94C § 31 (Class E (b)). And based on the breadth of that addition to its list, the State has prosecuted an individual in the Boston Municipal Court Department for conduct associated with prescription strength *ibuprofen*, a common pain reliever.[12] *See* Mass. Gen. Laws ch. 94C § 32D. Under the Eighth Circuit's rule, if a noncitizen were convicted of a paraphernalia offense in Massachusetts, she would be removable even though the conviction could involve no more than containers for prescription-strength ibuprofen. Mass. Gen. L. Ch. 94C §§ 32I (paraphernalia offense), 1 (drug paraphernalia definition), 31 (controlled substance definition).

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[12] No. 1201CR003986 (Count 5) (filed Sept. 10, 2012); see Mass. Gen. Laws 94C § 32D.

The government's requirement to show a realistic probability of prosecution misapplies this Court's precedent, imposes an inherently unfair standard on unrepresented, detained noncitizens, and ignores the unsurprising evidence that States do in fact enforce their laws as written.

* * *

This Court should reverse the Eighth Circuit's judgment affirming deportation because the Kansas drug paraphernalia statute covers conduct beyond that defined in the generic federal definition the Government must satisfy to justify deportation. Section 1227(a)(2)(B)(i) requires the violation to be connected to a section-802 substance so that a federally controlled substance is an element of the conviction. Because Kansas's controlled substance definition includes section-802 substances along with non-section-802 substances, the State conviction does not necessarily require all of the elements mandated by section 1227(a)(2)(B)(i), and removal is not permissible under that law. *Moncrieffe*, 133 S. Ct. at 1684 (describing matching requirement); *Descamps*, 133 S. Ct. at 2283 (same).

III. Alternatively, the Court could remand the case on the issue of divisibility.

The Court should reverse and remand because Mellouli's Kansas conviction does not justify removal. If, however, the Court is concerned that no evaluation has been made as to whether the Kansas statute is divisible by substance and therefore subject to the modified categorical approach, this Court could remand for that determination. A statute that includes

"multiple, alternative versions of the crime," by "listing potential offense elements in the alternative" is divisible and subject to the modified categorical approach. *Descamps*, 133 S. Ct. at 2283-84. Under the modified categorical approach, a court can look to a limited set of documents—the indictment, jury instructions, plea colloquy, and plea agreement—solely "to identify, from among several alternatives, the crime of conviction" so that the court can compare the facts necessarily established by that conviction to the elements required by the removal charge. *Id.* at 2285 & n.2. No adjudicator has reached this question here because none has applied the categorical approach using the correct interpretation of the federal removal ground.[13] Because no court has reached the question of whether Mellouli's statute of conviction is divisible, the Court could remand for a decision on whether the modified categorical approach applies and whether Mellouli's conviction matches the requirements of section 1227(a)(2)(B)(i).

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[13] Kansas's paraphernalia crime is defined in terms of the various substances Kansas controls. Kan. Stat. Ann. §§ 21-5709; 21-5701. If the Kansas statute is divisible by substance, meaning the substance is an element, those crimes of conviction that establish a relationship to section-802 substances would match the federal removal ground and those unrelated to section-802 substances would not. If the statute is divisible, no consideration of the realistic probability of prosecution is necessary because the separate, alternative crimes could not be overbroad in this way.

CONCLUSION

This Court should reverse the Eighth Circuit's judgment and remand to vacate the order of removal.

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STATUTORY APPENDIX

STATUTORY APPENDIX

TABLE OF CONTENTS

8 U.S.C. § 1227	1a
21 U.S.C. § 802	1a
Kan. Stat. Ann. § 21-5701	2a
Kan. Stat. Ann. § 21-5709	2a

8 U.S.C. § 1227. Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

* * *

(2) Criminal offenses

* * *

(B) Controlled substances

(i) Conviction

Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

* * *

21 U.S.C. § 802 - Definitions

* * *

(6) The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter.

The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.

* * *

Kan. Stat. Ann. § 21-5701. Definitions

(a) "Controlled substance" means any drug, substance or immediate precursor included in any of the schedules designated in K.S.A. 65-4105, 65-4107, 65-4109, 65-4111 and 65-4113, and amendments thereto.

* * *

(f) "Drug paraphernalia" means all equipment and materials of any kind which are used, or primarily intended or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body a controlled substance and in violation of this act.

* * *

Kan. Stat. Ann. § 21-5709. Unlawful possession of certain drug precursors and drug paraphernalia

(a) It shall be unlawful for any person to possess ephedrine, pseudoephedrine, red phosphorus, lithium metal, sodium metal, iodine, anhydrous ammonia, pressurized ammonia or phenylpropanolamine, or their salts, isomers or salts of isomers with an intent to use the product to manufacture a controlled substance.

(b) It shall be unlawful for any person to use or possess with intent to use any drug paraphernalia to:

(1) Manufacture, cultivate, plant, propagate, harvest, test, analyze or distribute a controlled substance; or

(2) store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body.

(c) It shall be unlawful for any person to use or possess with intent to use anhydrous ammonia or pressurized ammonia in a container not approved for that chemical by the Kansas department of agriculture.

(d) It shall be unlawful for any person to purchase, receive or otherwise acquire at retail any compound, mixture or preparation containing more than 3.6 grams of pseudoephedrine base or ephedrine base in any single transaction or any compound, mixture or preparation containing more than nine grams of pseudoephedrine base or ephedrine base within any 30-day period.

(e)(1) Violation of subsection (a) is a drug severity level 3 felony;

(2) violation of subsection (b)(1) is a:

(A) Drug severity level 5 felony, except as provided in subsection (e)(2)(B); and

(B) class A nonperson misdemeanor if the drug paraphernalia was used to cultivate fewer than five marijuana plants;

(3) violation of subsection (b)(2) is a class A nonperson misdemeanor;

(4) violation of subsection (c) is a drug severity level 5 felony; and

(5) violation of subsection (d) is a class A nonperson misdemeanor.

(f) For persons arrested and charged under subsection (a) or (c), bail shall be at least $50,000 cash or surety, and such person shall not be released upon the person's own recognizance pursuant to K.S.A. 22-2802, and amendments thereto, unless the court determines, on the record, that the defendant is not likely to reoffend, the court imposes pretrial supervision or the defendant agrees to participate in a licensed or certified drug treatment program.

RESPONDENT'S BRIEF

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
NOV 20 2014
OFFICE OF THE CLERK

No. 13-1034

In the Supreme Court of the United States

MOONES MELLOULI, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Under 8 U.S.C. 1227(a)(2)(B)(i), an alien is removable from the United States if convicted of "a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21)."

The question presented is whether, for a state drug-paraphernalia conviction to permit an alien's removal, the government must prove that an alien's particular conviction related to a substance controlled under 21 U.S.C. 802.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provisions involved 2
Statement 2
Summary of argument 16
Argument:
A conviction under the Kansas drug-paraphernalia law is a conviction for a violation of a state law relating to a federally controlled substance under 8 U.S.C. 1227(a)(2)(b)(i) 21
A. The Kansas controlled-substance statutes are laws "relating to" federally controlled substances 22
1. The text, structure, and purpose of Section 1227(a)(2)(B)(i) establish its applicability 23
2. Petitioner's arguments do not justify a different reading of Section 1227(a)(2)(B)(i) 33
3. Cases concerning the categorical approach support application of Section 1227(a)(2)(B)(i) to petitioner 38
B. A conviction under the Kansas law prohibiting possession of drug paraphernalia, in particular, is a removable offense under Section 1227(a)(2)(B)(i) 40
C. Any ambiguity should be resolved in favor of the Board's reasonable interpretation 45
1. Principles of *Chevron* deference apply 45
2. The Board reasonably concluded that state drug-paraphernalia crimes are removable offenses 48
Conclusion 53
Appendix — Statutory provisions 1a

TABLE OF AUTHORITIES

Cases: Page

Abramski v. *United States*, 134 S. Ct. 2259 (2014) 29, 47
Andrus v. *Glover Constr. Co.*, 446 U.S. 608 (1980) 35
Barnhart v. *Thomas*, 540 U.S. 20 (2003) 25
Beckford, In re, 22 I. & N. Dec. 1216 (B.I.A. 2000) 31
Carachuri-Rosendo v. *Holder*, 560 U.S. 563 (2010) 11, 23, 30, 47
Caraco Pharm. Labs., Ltd. v. *Novo Nordisk A/S*, 132 S. Ct. 1670 (2012) 23
Celotex Corp. v. *Edwards*, 514 U.S. 300 (1995) 23
Chairez-Castrejon, In re, 26 I. & N. Dec. 349 (B.I.A. 2014) 48
Chevron U.S.A. Inc. v. *NRDC, Inc.*, 467 U.S. 837 (1984) 15, 21, 44
C-V-T-, In re, 22 I. & N. Dec. 7 (B.I.A. 1998) 11
Davey, In re, 26 I. & N. Dec. 37 (B.I.A. 2012) 14, 36
Desai v. *Mukasey*, 520 F.3d 762 (7th Cir. 2008) 28, 35
De Jesus Rodriguez, In re, 2009 WL 2437164 (B.I.A. July 30, 2009) 31
Descamps v. *United States*, 133 S. Ct. 2276 (2013) 38
Dominguez-Rodriguez, In re, 26 I. & N. Dec. 408 (B.I.A. 2014) 13
Federal Trade Comm'n v. *Mandel Bros., Inc.*, 359 U.S. 385 (1959) 25
Ferreira, In re, 26 I. & N. Dec. 415 (B.I.A. 2014) 49
Gonzales v. *Duenas-Alvarez*, 549 U.S. 183 (2007) 39, 40, 47
Gonzales v. *Thomas*, 547 U.S. 183, 186 (2006) 50
Gonzalez-Chavez, In re, 2006 WL 901378 (B.I.A. Feb. 23, 2006) 31
Harmelin v. *Michigan*, 501 U.S. 957 (1991) 30

Cases—Continued: Page

Hillman v. *Maretta*, 133 S. Ct. 1943 (2013) 35, 52
Huerta-Flores, In re, 2010 WL 5808899 (B.I.A. Aug. 27, 2010), review granted and remanded by *Huerta-Flores* v. *Holder*, No. 10-73389, 2014 WL 3361435 (9th Cir. July 10, 2014) 16, 50
INS v. *Aguirre-Aguirre*, 526 U.S. 415 (1999) 45, 46
Jama v. *Immigration & Customs Enforcement*, 543 U.S. 335 (2005) 25
James v. *United States*, 550 U.S 192 (2007) 39
Kawashima v. *Holder*, 132 S. Ct. 1166 (2012) 47
Leocal v. *Ashcroft*, 543 U.S. 1 (2004) 46, 47
Lopez v. *Gonzales*, 549 U.S. 47 (2006) 47
Martinez Espinoza, In re, 25 I. & N. Dec. 118 (B.I.A. 2009) ..... *passim*
Martinez-Gomez, In re, 14 I. & N. Dec. 104 (B.I.A. 1972) 51
Medel-Navarro, In re, 2005 WL 698568 (B.I.A. Feb. 9, 2005) 31
Metropolitan Life Ins. Co. v. *Massachusetts*, 471 U.S. 724 (1985) 23
Moncrieffe v. *Holder*, 133 S. Ct. 1678 (2013) 11, 13, 30, 39, 47
Morales v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992) 17, 23, 25, 41
Mota v. *Mukasey*, 543 F.3d 1165 (9th Cir. 2008) 45
National Treasury Emps. Union v. *Von Raab*, 489 U.S. 656 (1989) 30
Negusie v. *Holder*, 555 U.S. 511 (2009) 45, 50
Nijhawan v. *Holder*, 557 U.S. 29 (2009) 13, 47
Octane Fitness, LLC v. *ICON Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014) 23
Padilla v. *Kentucky*, 559 U.S. 356 (2010) 32

Cases—Continued: Page

Paulus, In re, 11 I. & N. Dec. 274 (B.I.A. 1965) 16, 49
Pilot Life Ins. Co. v. *Dedeaux*, 481 U.S. 41 (1987).....24
Posters 'N' Things, Ltd. v. *United States*, 511 U.S. 513 (1994).....8
Russello v. *United States*, 464 U.S. 16, 23 (1983).....27
Scialabba v. *Cuellar de Osorio*, 134 S. Ct. 2191 (2014).....45, 46
Shaw v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983) 23, 24
Taylor v. *United States*, 495 U.S. 575 (1990).....19, 38
T-C-, In re, 7 I. & N. Dec. 100 (B.I.A. 1956) 51
Torres Sotelo, In re, 2007 WL 2074451 (B.I.A. June 18, 2007) 49
United States v. *Gonzales*, 520 U.S. 1 (1997).....44

Treaty, statutes and regulations:

Convention Against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 113.....11
Act of July 14, 1960, Pub. L. No. 86-648, § 9, 74 Stat. 505.....36, 37
Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. M, § 1751, 100 Stat. 3207-47 .....36, 37
Controlled Substances Act, 21 U.S.C. 801 *et seq.* 2
21 U.S.C. 801(2).....30
21 U.S.C. 801(3).....30
21 U.S.C. 801(4).....30
21 U.S.C. 802.....18, 34
21 U.S.C. 802(6).....34
21 U.S.C. 802(34)(C) 10

Statutes and regulations—Continued: Page

21 U.S.C. 802(34)(K) 10
21 U.S.C. 811 2
21 U.S.C. 811(a) 2
21 U.S.C. 811(c) 2, 3
21 U.S.C. 812 2
21 U.S.C. 812(a) 2
21 U.S.C. 812(b) 2
21 U.S.C. 812(c) (Sched. I(d)(2)(B)(iii)) 10
21 U.S.C. 812(c) (Sched. I(d)(2)(B)(iv)) 10
21 U.S.C. 841(a) 2
21 U.S.C. 844(a) 2
21 U.S.C. 863 8
Crime Control Act of 1990, Pub. L. No. 101-647, § 2401, 104 Stat. 4858 8
Dictionary Act, 1 U.S.C. 1 ..... 18, 34, 35
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 2
8 U.S.C. 1101(43)(B) 28
8 U.S.C. 1158 11
8 U.S.C. 1182(a)(2)(A)(i)(II) 13, 48
8 U.S.C. 1184(d)(3)(B)(iii) 28
8 U.S.C. 1184(r)(5)(B)(iii) 28
8 U.S.C. 1227 ..... 26, 28, 38
8 U.S.C. 1227(a)(2)(A)(iii) 27
8 U.S.C. 1227(a)(2)(B)(i) ..... *passim*
8 U.S.C. 1227(a)(2)(C) 27
8 U.S.C. 1227(a)(2)(E) 27
8 U.S.C. 1227(a)(3)(A) 32
8 U.S.C. 1227(a)(5) 32
8 U.S.C. 1229b(a) 11, 14, 27

Statutes and regulations—Continued: Page

8 U.S.C. 1231(b)(3) 11
8 U.S.C. 1375a(d)(2)(B)(iv) 29
Mail Order Drug Paraphernalia Control Act, Pub. L. No. 99-570, 100 Stat. 3207-51 7
§ 1822(a), 100 Stat. 3207-51 8
§ 1822(d), 100 Stat. 3207-51 7
Narcotics Control Act of 1956, Pub. L. No. 84-728, § 301, 70 Stat. 575 ..... 36, 37
Synthetic Drug Abuse Prevention Act of 2012, Pub. L. No. 112-144, Tit. XI, Subtit. D, § 1151, 26 Stat. 1130 10
18 U.S.C. 16 46
18 U.S.C. 16(a) 27
Ala. Code § 20-2-20(a) (LexisNexis 2006) 4
Ark. Code Ann. § 5-64-201(a)(2) (Supp. 2013) 4
D.C. Code § 48-902.01 (LexisNexis Supp. 2014) 4
Fla. Stat. Ann. § 893.035(4) (West 2013) 4
Ga. Code Ann. § 16-13-22(a) (2011) 4
Idaho Code Ann. § 37-2702(a) (2011) 4
720 Ill. Comp. Stat. Ann. 570/201(a) (West Supp. 2014) 4
Ind. Code Ann. § 35-48-2-1(a) (LexisNexis 2009) 4
Iowa Code Ann. § 124.201(1) (West 2014) 4
1972 Kan. Sess. Laws 943-944 8
2010 Kan. Sess. Laws 50 35
Kan. Stat. Ann.:
(2002):
§ 65-4111(g) 9
(Supp. 2010):
§ 21-36a01(a) 10
§ 21-36a01(f) 10

Statutes and regulations—Continued: Page

§ 21-36a09(b) 10
§ 65-4105(d)(30) 9
§ 65-4105(d)(31) 9
§ 65-4105(d)(33) 9
§ 65-4105(d)(34) 9
§ 65-4105(d)(36) 9
§ 65-4113(d)(1) 9
§ 65-4113(e) 9
§ 65-4113(f) 9
(Supp. 2013):
§ 21-5701 ..... 10, 41
§ 21-5701(a) 10
§ 21-5701(f) 10, 41, 42
§ 21-5709(b) 10, 20, 41
§ 65-4102(b) 4, 8
Ky. Rev. Stat. Ann. § 218A.020(1) (LexisNexis Supp. 2014) 4
La. Rev. Stat. Ann. § 40:962(C) (2012) 4
Md. Code Ann., Crim. Law § 5-202(c) (LexisNexis 2012) 4
Mass. Ann. Laws ch. 94C, § 2(b) (LexisNexis 2010) 5
Minn. Stat. Ann. § 152.02, subdiv. 8 (West Supp. 2014) 4
Miss. Code Ann. § 41-29-111(1)(a) (West Supp. 2013) 4
Mo. Ann. Stat. § 195.015(1) (West 2011) 4
Mont. Code Ann. § 50-32-201 (2013) 4
Nev. Rev. Stat. Ann. § 453.146(2) (LexisNexis 2009) 4
N.H. Rev. Stat. Ann. § 318-B:1-a(I) (LexisNexis 2010) 5
N.J. Stat. Ann. § 24:21-3(a) (West Supp. 2014) 5
N.M. Stat. Ann. § 30-31-3(A) (Supp. 2014) 5

Statutes and regulations—Continued: Page

N.C. Gen. Stat. § 90-88(a1) (2013) 5
N.D. Cent. Code § 19-03.1-02(1) (2009) 5
Ohio Rev. Code Ann. § 3719.44(B) (LexisNexis 2012) 5
Okla. Stat. Ann. tit. 63, § 2-201(D) (West Supp. 2014) 5
35 Pa. Cons. Stat. Ann. § 780-103(a) (West 2012) 5
R.I. Gen. Laws § 21-28-2.01(a)(1) (2002) 5
S.C. Code Ann. § 61-4.201 (Supp. 2013) 5
Tex. Health & Safety Code Ann. § 481.034(d) (West 2010) 5
Tenn. Code Ann. § 39-17-403(a) (2014) 5
Va. Code Ann. § 54.1-3443(A) (Supp. 2014) 5
Wash. Rev. Code Ann. § 69.50.201(a)(1) (West Supp. 2014) 5
W. Va. Code Ann. § 60A-2-201(a) (LexisNexis 2014) 5
Wis. Stat. Ann. § 961.11(1m) (West 2007) 5
Wyo. Stat. Ann. § 35-7-1011(a) (2013) 5
8 C.F.R. 1208.16-1208.18 12
21 C.F.R. 1308.11-1308.15 13

Miscellaneous:

Black's Law Dictionary
(9th ed. 2009) 34
(5th ed. 1979) 23
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Jimson Weed (Datura stramonium) (Jan. 2013), http://www.deadiversion.usdoj.gov/drug_chem_info/jimson_w.pdf 9

Miscellaneous—Continued: Page

National Drug Threat Assessment Summary (2013) 35
Salvia Divinorum and Salvinorin A (Oct. 2013), http://www.deadiversion.usdoj.gov/drug_chem_info/salvia_d.pdf 9
76 Fed. Reg. 11,075 (Mar. 1, 2011) 10, 35
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Miscellaneous—Continued: Page

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In the Supreme Court of the United States

No. 13-1034

MOONES MELLOULI, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 719 F.3d 995. The decisions of the Board of Immigration Appeals (Pet. App. 17-19) and the immigration judge (Pet. App. 23-35) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 2013 (Pet. App. 15-16). A petition for rehearing was denied on October 28, 2013 (Pet. App. 36-37). On January 17, 2014, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including February 25, 2014, and the petition was filed on that date. The petition for a writ of certiorari was granted on June 30, 2014. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-15a.

STATEMENT

This case concerns the provision of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, under which an alien is removable if he has been convicted of a violation of "any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21)." 8 U.S.C. 1227(a)(2)(B)(i).

1. a. In the United States, controlled substances are regulated by the federal government and also by the States, typically under frameworks that largely mirror the federal scheme. Since 1970, the federal government has regulated controlled substances through the Controlled Substances Act (CSA), 21 U.S.C. 801 *et seq.* That statute established five schedules of controlled substances and precursors the possession or distribution of which is generally prohibited, see 21 U.S.C. 811, 812, 841(a), 844(a), and authorizes the Attorney General to add or remove drugs on those schedules based on specified criteria. 21 U.S.C. 811(a) and (c), 812(a) and (b). In exercising that authority, the Attorney General is to consider, with respect to the substance in question:

(1) Its actual or relative potential for abuse.

(2) Scientific evidence of its pharmacological effect, if known.

(3) The state of current scientific knowledge regarding the drug or other substance.

(4) Its history and current pattern of abuse.

(5) The scope, duration, and significance of abuse.

(6) What, if any, risk there is to the public health.

(7) Its psychic or physiological dependence liability.

(8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter.

21 U.S.C. 811(c). The Attorney General has regularly added drugs to those schedules based on those criteria, and has removed drugs as well. The most recently published schedules of federally controlled substances appear at 21 C.F.R. 1308.11-1308.15.

b. Most States, including Kansas, have adopted statutory frameworks that are designed to parallel the federal regime. Contemporaneously with the drafting and consideration of the CSA, state and federal authorities worked together to create a model state law that would "complement the comprehensive drug legislation being proposed to Congress at the national level." *Special Message to the Congress on Control of Narcotics and Dangerous Drugs*, 1969 Pub. Papers 514 (July 14, 1969) (*Presidential Message*).

That model law—the Uniform Controlled Substances Act (1970) (UCSA (1970)), 9 U.L.A. 853, Pt. 5 (2007)—seeks to create "an interlocking trellis of federal and state law to enable government at all levels to control more effectively the drug abuse problem" by mirroring the CSA. See UCSA (1970) Prefatory note, 9 U.L.A. 854; see also *Presidential Message* 514 (also describing federal and state law as an "interlocking trellis"). The UCSA was promulgated by the National Conference of Commissioners on Uniform State Laws based on the work of a committee that

included a federal representative. See Nat'l Conference of Comm'rs on Uniform State Laws, *Uniform Controlled Substances Act* 2 (1970). The model law created drug schedules identical to those in the CSA as originally enacted, and provided a mechanism for States to add or remove drugs, based on the same criteria employed by the Attorney General under the CSA. UCSA (1970) § 201 cmt., 9 U.L.A. 867; § 201, at 866 (setting out criteria identical to thosfe in federal statute). Because the UCSA called for the States to apply these criteria themselves, the drafters contemplated that, over time, the state and federal schedules would not remain precisely identical. See § 201 cmt. *id.* at 868 (stating that "[t]he Uniform Act is not intended to prevent a State from adding or removing substances from the schedules"); Prefatory note, *id.* at 855 (noting that model law "insures legislative and administrative flexibility to enable the States to cope with both present and future drug problems").

Thirty-five States and the District of Columbia adhere to a UCSA-based scheduling scheme.[1]

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[1] Ala. Code § 20-2-20(a) (LexisNexis 2006); Ark. Code Ann. § 5-64-201(a)(2) (Supp. 2013); D.C. Code § 48-902.01 (LexisNexis Supp. 2014); Fla. Stat. Ann. § 893.035(4) (West 2013); Ga. Code Ann. § 16-13-22(a) (2011) (one additional factor); Idaho Code Ann. § 37-2702(a) (2011); 720 Ill. Comp. Stat. Ann. 570/201(a) (West Supp. 2014) (two additional factors); Ind. Code Ann. § 35-48-2-1(a) (LexisNexis 2009); Iowa Code Ann. § 124.201(1) (West 2014); Kan. Stat. Ann. § 65-4102(b) (Supp. 2013); Ky. Rev. Stat. Ann. § 218A.020(1) (LexisNexis Supp. 2014); La. Rev. Stat. Ann. § 40:962(C) (2012); Md. Code Ann., Crim. Law § 5-202(c) (LexisNexis 2012); Minn. Stat. Ann. § 152.02, subdiv. 8 (West Supp. 2014); Miss. Code Ann. § 41-29-111(1)(a) (West Supp. 2013); Mo. Ann. Stat. § 195.015(1) (West 2011); Mont. Code Ann. § 50-32-201 (2013); Nev. Rev. Stat. Ann. § 453.146(2) (LexisNexis 2009); N.H. Rev. Stat. Ann. § 318-

c. Federal and state governments also worked together to stem drug distribution and use through criminal controls on drug paraphernalia. State authorities sought the assistance of the Drug Enforcement Administration (DEA) in drafting laws on this subject. See Model Drug Paraphernalia Act, reprinted in *Drug Paraphernalia: Hearing Before the House Select Comm. on Narcotics Abuse and Control*, 96th Cong., 1st Sess. 88 (1979) (1979 Hearing). A committee of the House of Representatives held a hearing at which witnesses articulated concern that existing laws were inadequate to address the proliferation of tools for drug consumption and distribution. See 1979 Hearing 1-45. In connection with the hearing, the DEA drafted the Model Drug Paraphernalia Act, which it recommended as an amendment to the UCSA. See *id.* at 88-95 (reprinting Model Drug Paraphernalia Act). Thirty-eight States, including Kansas, then adopted paraphernalia bans patterned on the Model

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B:1-a(I) (LexisNexis 2010); N.J. Stat. Ann. § 24:21-3(a) (West Supp. 2014); N.M. Stat. Ann. § 30-31-3(A) (Supp. 2014); N.C. Gen. Stat. § 90-88(a1) (2013); N.D. Cent. Code § 19-03.1-02(1) (2009); Ohio Rev. Code Ann. § 3719.44(B) (LexisNexis 2012); Okla. Stat. Ann. tit. 63, § 2-201(D) (West Supp. 2014); 35 Pa. Cons. Stat. Ann. § 780-103(a) (West 2012) (one factor changed); R.I. Gen. Laws § 21-28-2.01(a)(1) (2002); S.C. Code Ann. § 61-4.201 (Supp. 2013) (one additional factor); Tenn. Code Ann. § 39-17-403(a) (2014) (one additional factor); Va. Code Ann. § 54.1-3443(A) (Supp. 2014) (one additional factor); Wash. Rev. Code Ann. § 69.50.201(a)(1) (West Supp. 2014); W. Va. Code Ann. § 60A-2-201(a) (LexisNexis 2014) (omitting one factor); Wis. Stat. Ann. § 961.11(1m) (West 2007); Wyo. Stat. Ann. § 35-7-1011(a) (2013) (one additional factor); see also Mass. Ann. Laws ch. 94C, § 2(b) (LexisNexis 2010) (adopting comparable eight factors, but not for criminal law purposes); Tex. Health & Safety Code Ann. § 481.034(d) (West 2010) (same, with an additional factor).

Drug Paraphernalia Act, and an additional six states adopted distinct regimes to control paraphernalia. See Kerry Murphy Healey, Nat'l Inst. of Justice, *State and Local Experience with Drug Paraphernalia Laws* 15, 108-139 (Feb. 1988).

The Model Drug Paraphernalia Act prohibits the possession of drug paraphernalia, defined as "all equipment, products and materials of any kind which are used, intended for use, or designed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body" a substance on the State's controlled-substance schedules, in violation of the State's controlled substance laws. See 1979 Hearing 89 (Model Drug Paraphernalia Act, Art. I (definitions)).

The drafters adopted a broad definition of paraphernalia because "there are so many forms of drug paraphernalia that any attempt to define the term in more specific language would guarantee major loopholes in the Act's coverage." 1979 Hearing 91 (Model Drug Paraphernalia Act, Art. I cmt.). To stem the use of household objects to facilitate drug consumption and distribution, the drafters chose to criminalize possession of objects that have innocent purposes when possessed with criminal intent. For instance, though "a spoon, a hypodermic syringe, and a length of surgical tubing" have "legitimate uses in the community," if those objects were "assembled and used by an addict to illegally melt heroin and inject it into his body, they become drug paraphernalia." *Id.* at 92. Similarly, "balloons, envelopes, and other containers" would be

paraphernalia if "used, intended for use, or designed for use" in packaging drugs or "storing or concealing controlled substances." *Id.* at 89 (Model Drug Paraphernalia Act, Art. I (definitions)).

d. Seven years later, Congress enacted a statute targeting the sale of paraphernalia, known as the Mail Order Drug Paraphernalia Control Act, Pub. L. No. 99-570, 100 Stat. 3207-51. That law's House sponsor explained that "[a]though State drug paraphernalia laws * * * have been quite effective," purveyors of drug paraphernalia were operating mail-order businesses in "a deliberate attempt to circumvent State and local law enforcement efforts to control the sale of paraphernalia and to reduce drug abuse." *Mail Order Drug Paraphernalia Control Act: Hearing on H.R. 1625 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 16 (1986) (1986 Hearing).

To target that activity, the Mail Order Drug Paraphernalia Control Act targeted commercial sales of paraphernalia, which it defined as "any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, possession of which is unlawful" under the CSA. § 1822(d), 100 Stat. 3207-51; see 1986 Hearing 15 (statement of sponsor Rep. Mel Levine) (explaining that definition was "drafted closely after the Model Drug Paraphernalia Act"). The federal provision made it illegal to use the Postal Service or another interstate conveyance as part of a scheme to sell drug paraphernalia; to offer paraphernalia for

sale or transport in interstate or foreign commerce; and to import or export drug paraphernalia. § 1822(a), 100 Stat. 3207-51.

In 1990, Congress replaced the paraphernalia provisions in the Mail Order Drug Paraphernalia Control Act with the current federal paraphernalia provisions, enacted in the Crime Control Act of 1990, Pub. L. No. 101-647, § 2401, 104 Stat. 4858. See 21 U.S.C. 863 (codifying paraphernalia provisions); see also *Posters 'N' Things, Ltd.* v. *United States*, 511 U.S. 513, 516 n.5 (1994). The revisions changed the wording of the statute but did not materially alter its substantive scope. *Ibid.*

e. Kansas has adopted the collaborative approaches of the UCSA and the Model Drug Paraphernalia Act. The Kansas Legislature enacted the UCSA in 1972, designating as "controlled" the same drugs that were then controlled under the federal CSA, and embracing the same criteria for adding and removing substances as are set out in the CSA. See 1972 Kan. Sess. Laws 943-944; see also Kan. Stat. Ann. § 65-4102(b) (Supp. 2013). Under Kansas's statute as currently in effect, the State Board of Pharmacy annually submits a report to legislators concerning proposed scheduling or removal of substances based on consideration of those factors, and the legislature then decides on any changes. *Ibid.*

The resulting Kansas schedules mirror the federal controlled-substance schedules with only minor deviation. At the time of petitioner's arrest, Kansas controlled 306 substances by name, nine of which were not identifiable as federally controlled substances. Those nine substances are a psychoactive plant known as salvia divinorum and its active ingredient sal-

vinorum A, which have hallucinogenic properties; an herb known as datura stramonium, "gypsum weed" or "jimson weed," consumed to produce euphoria and delirium; two synthetic cannabinoids; the hallucinogen TFMPP; the inhalant butyl nitrate; the stimulant propylhexedrine; and ephedrine and pseudoephedrine, stimulants that are used in methamphetamine production.[2]

Two of those substances—pseudoephedrine and ephedrine—were nevertheless subject to federal con-

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[2] See Kan. Stat. Ann. § 65-4105(d)(30) (Supp. 2010) (scheduling salvia divinorum); DEA, *Salvia Divinorum and Salvinorin A* (Oct. 2013), http://www.deadiversion.usdoj.gov/drug_chem_info/salvia_d.pdf (describing drug); Kan. Stat. Ann. § 65-4105(d)(31) (Supp. 2010) (scheduling datura stramonium); DEA, *Jimson Weed (Datura stramonium)* (Jan. 2013), http://www.deadiversion.usdoj.gov/drug_chem_info/jimson_w.pdf (describing drug); see Kan. Stat. Ann. § 65-4105(d)(33) (Supp. 2010) (scheduling synthetic cannabinoid 1- pentyl-3-(1-naphthoyl)indole, also known as JWH-018); *id.* § 65-4105(d)(34) (scheduling synthetic cannabinoid 1-Butyl-3-(1-naphthoyl)indole, also known as JWH-073); *id.* § 65-4105(d)(36) (scheduling 1-(3-[trifluoromethylphenyl]) piperazine, or TFMPP); DEA, *1-[3-(Trifluoro-methyl)-phenyl]piperazine* (Aug. 2013), http://www.deadiversion.usdoj.gov/drug_chem_info/tfmpp.pdf (describing TFMPP); Kan. Stat. Ann. § 65-4111(g) (2002) (scheduling butyl nitrite); Ronald W. Wood, *The Acute Toxicity of Nitrite Inhalants* (1988) (discussing risks associated with butyl nitrate and other nitrite inhalants), available at https://urresearch.rochester.edu/fileDownloadForInstitutionalItem.action?itemId=967&itemFileId=1141 (last visited Nov. 18, 2014); Kan. Stat. Ann. § 65-4113(d)(1) (Supp. 2010) (scheduling propylhexedrine); Julia Paige Fernandez & Elie M. Francis, *Propylhexedrine: A Vintage Drug of Abuse, Rediscovered*, Journal of Psychoactive Drugs, July 2012, at 277-279 (describing properties of propylhexedrine); see Kan. Stat. Ann. § 65-4113(e) (Supp. 2010) (scheduling ephedrine); *id.* § 65-4113(f) (scheduling pseudoephedrine).

trols at all relevant times, through federal designation as "list I" chemicals used in the manufacture of federally controlled substances. 21 U.S.C. 802(34)(C) and (K). Two more of the nine substances—the synthetic cannabinoids—were federally controlled through an emergency action the year after petitioner's arrest. See 76 Fed. Reg. 11,075 (Mar. 1, 2011). Those drugs were permanently controlled the following year by the Synthetic Drug Abuse Prevention Act of 2012, Pub. L. No. 112-144, Tit. XI, Subtit. D, § 1151, 26 Stat. 1130; 21 U.S.C. 812(c) (Sched. I(d)(2)(B)(iii) and (iv)).

Kansas has also adopted a paraphernalia ordinance based on the Model Drug Paraphernalia Act. Accordingly, it is unlawful in Kansas "for any person to use or possess with intent to use any drug paraphernalia to * * * store, contain, conceal, inject, ingest, inhale, or otherwise introduce a controlled substance," as defined under Kansas law, "into the human body." Kan. Stat. Ann. § 21-5709(b) (Supp. 2013); *id.* § 21-5701. The State's definition of drug paraphernalia generally mirrors that in the Model Drug Paraphernalia Act, reaching "all equipment and materials of any kind which are used, or primarily intended or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body a controlled substance" in violation of Kansas law. *Id.* § 21-5701(f).[3]

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[3] At the time of petitioner's conviction, Kan. Stat. Ann. §§ 21-5701(a) and (f), 21-5709(b) (Supp. 2013) were codified at, respectively, Kan. Stat. Ann. §§ 21-36a01(a) and (f), 21-36a09(b) (Supp. 2010).

2. Under the INA, "[a]ny alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable." 8 U.S.C. 1227(a)(2)(B)(i).

Removal is not mandatory for all aliens convicted of crimes of this type. The Attorney General, in his discretion, may grant cancellation of removal for an alien who has been a lawful permanent resident for not less than five years and has resided in the United States continuously for seven years after having been admitted in any status, so long as the alien has not committed one of the narrower class of crimes referred to as aggravated felonies. See 8 U.S.C. 1229b(a); see also, *e.g.*, *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563, 571 (2010); *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1692 (2013). Exercise of that discretion generally turns on a balancing of factors, including duration of residence, family or business ties, employment history, evidence of good character, the nature and circumstances of the grounds of removal, and whether the alien has committed other crimes or otherwise shown bad character. See *In re C-V-T-*, 22 I. & N. Dec. 7, 11 (B.I.A. 1998).

In addition, an alien who is removable under 8 U.S.C. 1227(a)(2)(B)(i) may be eligible for asylum, see 8 U.S.C. 1158; withholding of removal, 8 U.S.C. 1231(b)(3); and protection under the Convention Against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess.

(1988), 1465 U.N.T.S. 113; see 8 C.F.R. 1208.16-1208.18.

3. Petitioner, a native and citizen of Tunisia, was admitted into the United States in 2004 on a student visa. J.A. 12. He became a conditional permanent resident in 2009, and the conditions on his permanent residency were lifted in 2011. *Ibid.*

In 2010, the year after petitioner became a conditional permanent resident, he was arrested for driving under the influence of alcohol or drugs and driving with a suspended license. Pet. App. 5-6; J.A. 16. He was taken to a detention facility. Pet. App. 5-6. According to an affidavit submitted in the state criminal prosecution, petitioner was questioned there about whether he had drugs on his person and said he did not. J.A. 17-18. During a search, however, deputies discovered four orange tablets marked "M Aphet Salts 30 mg" hidden in petitioner's sock. *Ibid.* Petitioner admitted the tablets were Adderall, a controlled substance under both federal and Kansas law. J.A. 18; Pet. 4 n.2. Petitioner acknowledged that he did not have a prescription for the drugs. J.A. 18. Based on the sworn affidavit detailing these events, a complaint was filed charging petitioner with trafficking contraband in a jail. J.A. 19-22.

In July 2010, petitioner pleaded guilty to using or possessing drug paraphernalia—specifically, a sock used to conceal and store a controlled substance. J.A. 23-34; Pet. App. 6. He also pleaded guilty to driving under the influence of alcohol or drugs. J.A. 16. On both charges, petitioner was sentenced to a suspended jail term of 359 days and 12 months of probation. J.A. 31.

4. After the Department of Homeland Security (DHS) initiated removal proceedings, an immigration judge (IJ) found that petitioner was removable. Pet. App. 29-35. The judge relied on Board of Immigration Appeals (Board or BIA) precedent establishing that drug-paraphernalia convictions in States that ban federally controlled substances and some additional drugs qualify as convictions under state laws "relating to" federally controlled substances. *Id.* at 31-33 (discussing *In re Martinez Espinoza*, 25 I. & N. Dec. 118, 121 (B.I.A. 2009)). Applying *Martinez Espinoza*, which had interpreted identical language in an admissibility provision, 8 U.S.C. 1182(a)(2)(A)(i)(II), the IJ concluded that petitioner's conviction under Kansas's drug-paraphernalia statute made him removable, even though "the Kansas definition of 'controlled substance' does not 'map perfectly' the definition of that term as used in section 102 of the [federal] Controlled Substances Act." Pet. App. 33-34 (citation omitted).

In a portion of the IJ's decision not challenged here, the IJ also found that petitioner's offense did not fall within the exception to removability for "a single offense involving possession for one's own use of 30 grams or less of marijuana," 8 U.S.C. 1227(a)(2)(B)(i). Pet. App. 34-35. The IJ applied a "circumstance-specific" approach to determining whether an offense was one "involving" possession of a small quantity of marijuana for personal use. *Ibid.*; see *In re Dominguez-Rodriguez*, 26 I. & N. Dec. 408, 411 (B.I.A. 2014) (explaining that circumstance-specific approach is warranted based on standards set forth in *Moncrieffe*, 133 S. Ct. at 1678, and *Nijhawan* v. *Holder*, 557 U.S. 29 (2009)); see also *In re Davey*, 26 I. & N. Dec. 37, 39 (B.I.A. 2012). Using that approach, the IJ

found by clear and convincing evidence that petitioner's drug-paraphernalia offense did not involve possession of less than 30 grams of marijuana, relying on the sworn affidavit in support of the criminal complaint in petitioner's case describing the discovery of petitioner's concealed tablets. Pet. App. 30.

The IJ accordingly ordered the removal of petitioner, see Pet. App. 20-21, who was not eligible for cancellation of removal because he did not satisfy the requirements regarding duration of permanent resident status, see 8 U.S.C. 1229b(a).

The Board denied a petition for review. It found the case was controlled by its decision in *Martinez Espinoza*, which had held that state drug-paraphernalia convictions constitute convictions for violations of laws relating to federally controlled substances in States that criminalize both federally controlled drugs and a small number of additional substances. Pet. App. 17-19.

According to DHS records, petitioner was removed from the country in 2012.

5. The court of appeals denied review. Pet. App. 1-14. The court noted that petitioner did not claim that paraphernalia crimes never fall within the provision making removable any alien convicted of a violation of any state law "relating to a controlled substance (as defined in section 802 of title 21)," within the meaning of 8 U.S.C. 1227(a)(2)(B)(i). Pet. App 9. The court agreed that such a claim would lack merit, expressing "no doubt" that, as a general matter, statutes seeking to address substance abuse by controlling drug paraphernalia "'relate to' federal control of illicit drugs." *Ibid.*

The court of appeals found unpersuasive petitioner's contention that state drug-paraphernalia crimes are removable offenses under Section 1227(a)(2)(B)(i) only if state conviction records establish the involvement of a federally controlled substance. Pet. App. 9. The court noted that petitioner's position was contrary to the view of the Board, which had construed Section 1227(a)(2)(B)(i) to categorically reach drug-paraphernalia convictions in States that control federally controlled substances and some additional drugs. *Id.* at 10.

The court of appeals observed that under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), it was required to defer to the Board's interpretation of the INA so long as the interpretation was "neither arbitrary nor manifestly unreasonable." Pet. App. 10. The court found the Board's construction here to be reasonable, agreeing that Congress's decision to make an alien removable when convicted of a violation of any state law "relating to a controlled substance" reflected an "intent to broaden the reach of the removal provision to include state offenses having 'a logical or causal connection' to federal controlled substances," including in the States that do not regulate precisely the same substances as are controlled under federal law. *Ibid.* (quoting *Webster's Third New International Dictionary* 1916 (1961)). Emphasizing that there is "nearly a complete overlap between the definition of controlled substance in 21 U.S.C. § 802 and in the statutes of States such as Kansas that adopted the [UCSA]," the court concluded that the Board reasonably construed Section 1227(a)(2)(B)(i) when it ruled that Kansas's drug-paraphernalia stat-

ute was a law "relating to" federally controlled substances. *Ibid.*

The court of appeals rejected petitioner's argument that the Board's treatment of drug-paraphernalia offenses was unreasonable because it was inconsistent with the Board's treatment of drug-possession crimes. The court concluded that a recent Board decision "strongly signal[led]" that the Board regarded state drug convictions as categorically a basis for removal "when the state statute has 'a list of narcotic drugs that is substantially identical to the federal one, and indeed was drafted with the obvious intent to match precisely with the federal schedules.'" Pet. App. 11 (quoting *In re Huerta-Flores*, 2010 WL 5808899, at *4 (B.I.A. Aug. 27, 2010) (unpublished), review granted and remanded by *Huerta-Flores* v. *Holder*, No. 10-73389, 2014 WL 3361435 (9th Cir. July 10, 2014)). In the court's view, that decision indicated that the Board did not now treat as controlling, with respect to such deliberately overlapping state statutes, its prior decision in *In re Paulus*, 11 I. & N. Dec. 274, 276 (B.I.A. 1965), which "involved pre-1970 controlled substance and INA statutes." Pet. App. 11. The court therefore rejected the "premise" that the Board had "arbitrarily ignored" *Paulus*. *Ibid.* The court accordingly denied the petition for review. *Id.* at 10-11, 14.

SUMMARY OF ARGUMENT

An alien who violates the drug-paraphernalia laws of a State that controls hundreds of federally controlled drugs and a small number of additional, similar substances is removable from the United States because—as the BIA has concluded—such a conviction constitutes "a violation of * * * any law or regulation of a State, the United States, or a foreign country

relating to a controlled substance (as defined in section 802 of title 21)." 8 U.S.C. 1227(a)(2)(B)(i).

A. 1. Aliens who commit drug crimes in States like Kansas that have adopted the Uniform Controlled Substances Act (UCSA) are removable under the Immigration and Nationality Act (INA), because state statutes that criminalize hundreds of federally controlled drugs and a handful of similar substances, are laws "relating to" federally controlled substances. 8 U.S.C. 1227(a)(2)(B)(i). State drug laws based on the UCSA—which are designed to form an "interlocking trellis" with federal drug laws, UCSA (1970) Prefatory note, 9 U.L.A. 854 (2007)—satisfy the "broad," common-sense meaning of the "relating to" requirement because they "stand in some relation" to, "have bearing or concern" on, "pertain" to, and "refer" to federally controlled substances. *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (citation omitted). And the statutory text makes clear that it is the state law under which the alien is convicted that must "relat[e] to" a federally controlled substance, not the particular conduct that led to the conviction.

Statutory structure confirms this meaning, for when Congress has imposed an immigration consequence only if an alien was convicted of particular conduct, Congress has directly said so—both in Section 1227 itself and in other portions of the INA addressing drug crimes. Congress's use of broader language in Section 1227(a)(2)(B)(i)—referring to any conviction under any *law* relating to a federally controlled substance—establishes that Congress meant the ordinary meaning of the "relating to" language it enacted.

Giving the statutory language its ordinary meaning serves well-settled purposes. It ensures that aliens who commit drug crimes are removable—even when, as the UCSA contemplates, federal and state controlled-substance schedules are not perfectly overlapping. Giving the statutory language its ordinary meaning also avoids unwarranted disparities. It ensures that removability of aliens convicted of crimes involving federally controlled substances does not vary from State to State; from state court to federal court; or from time to time as controlled-substance schedules are modified.

2. Petitioner's arguments do not justify a different reading. Contrary to petitioner's suggestion, the statute's definitional parenthetical carries meaning on any reading of Section 1227(a)(2)(B)(i), by ensuring that an alien is removable only if convicted under the serious criminal prohibitions covering federally controlled drugs, and not under myriad state and federal regulations limited to other pharmaceuticals.

Further, while the removal provision speaks of any law "relating to *a* controlled substance (as defined in section 802 of title 21)," rather than relating to "controlled substances," the singular form is necessary to track the definition in Section 802, which is singular. The use of the singular does not alter the provision's meaning, because, as a general matter, "words importing the singular include and apply to several persons, parties, or things." Dictionary Act, 1 U.S.C. 1.

Finally, petitioner draws the wrong inference from Congress's creation of a personal-use marijuana exception to removability. The enumeration of one exception indicates that others are not to be implied. Further, when Congress sought to carve out from

removability offenses involving marijuana, it did so with a circumstance-specific exception looking to the conduct underlying a conviction—rather than by carving out all convictions under entire drug statutes reaching marijuana crimes. It is implausible that Congress would have sought to carve out convictions involving state-controlled drugs through a much blunter exclusion that would reach all convictions under entire state drug statutes.

Reading Section 1227(a)(2)(B)(i) in the manner consistent with its text and structure is also consistent with the provision's history, which involves repeated expansions of the removal ground. Among these expansions was the 1986 revision specifying that an alien is removable if convicted of violating any state law relating to any federally controlled substance—not simply any law relating to a shorter list of drugs previously enumerated in the INA.

3. Interpreting Section 1227(a)(2)(B)(i) to permit removal of aliens convicted of drug violations in States that criminalize both federally controlled drugs and a small number of additional, similar substances is fully consistent with the categorical approach to identifying convictions. Statutes that speak of whether "convictions" meet certain criteria typically call for examination of the "statutory definitions" of the crimes at issue, not "the particular facts" underlying the convictions. *Taylor* v. *United States*, 495 U.S. 575, 600 (1990). Application of that approach confirms petitioner's removability, for an examination of the "statutory definition" of petitioner's crime establishes that he was convicted of violating "a law * * * relating to a controlled substance (as defined in section 802 of title 21)." 8 U.S.C. 1227(a)(2)(B)(i).

B. 1. Because state drug-paraphernalia statutes criminalize tools of drug consumption and distribution that can be used with federally controlled drugs as well as state-controlled substances, even individual violations under those statutes uniformly bear a relationship to federally controlled drugs. A statute criminalizing tools designed for use, intended for use, or used to "store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body," Kan. Stat. Ann. § 21-5709(b) (Supp. 2013), relates to federally controlled drugs because such tools are not limited in usefulness to any single substance. Thus, as the Board has explained, paraphernalia crimes are offenses relating to "the drug trade in general," not limited to any single substance. *In re Martinez Espinoza*, 25 I. & N. Dec. 118, 121 (B.I.A. 2009).

2. Petitioner fails to refute this connection. Petitioner principally asserts that violations of Kansas's paraphernalia law cannot be related to federally controlled substances because, like other state statutes based on the Model Drug Paraphernalia Act, Kansas's statute criminalizes possession of ordinary household objects when intended for use or used for drug-related purposes. These statutes, however, rest on a legislative judgment that even household objects can facilitate drug distribution and consumption when they are intended for use, or used, as tools of this type. And since the objects' utility for these purposes is not limited to a particular drug, these crimes relate to federally controlled substances.

C. Any ambiguity should be resolved in favor of the Board's reasonable interpretation. The Board is entitled to deference concerning its interpretations of

the INA under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984). Here, the Board's published opinion concerning paraphernalia reflects, at a minimum, a reasonable exercise of its interpretive authority. The Board explained that even if a state conviction must relate to federally controlled substances to form a basis for removal, state drug-paraphernalia crimes meet that standard. That is because paraphernalia statutes seek to control the tools that can be used with a variety of controlled substances—"conduct associated with the drug trade in general," rather than conduct linked only to a "*particular* drug." *Martinez Espinoza*, 25 I. & N. Dec. at 121. And while petitioner asserts that the Board's interpretation is unreasonable because it would permit removal based on what petitioner describes as "low-level offenses," Pet. Br. 38, the language of the removal provision, which allows removal of "[*a*]*ny* alien who at *any* time after admission has been convicted of a violation of * * * *any* law or regulation of a State * * * relating to a controlled substance" 8 U.S.C. 1227(a)(2)(B)(i) (emphasis added), reflects a judgment that drug crimes are serious enough to allow for an alien's removal. That language does not admit of a general minor-crime exception. The Board's construction is therefore reasonable.

ARGUMENT

A CONVICTION UNDER THE KANSAS DRUG-PARAPHERNALIA LAW IS A CONVICTION FOR A VIOLATION OF A STATE LAW RELATING TO A FEDERALLY CONTROLLED SUBSTANCE UNDER 8 U.S.C. 1227(a)(2)(B)(i)

Under the controlled-substance-removal provision in the INA, 8 U.S.C. 1227(a)(2)(B)(i), an alien convict-

ed of violating a state drug-paraphernalia law is removable from the United States, although the alien is not thereby rendered ineligible for discretionary relief from removal. By rendering removable aliens who violate state laws "relating to" federally controlled substances, the controlled-substance-removal provision reaches aliens convicted of state drug laws that apply to hundreds of federally controlled substances as well as a small number of additional, similar drugs. *Ibid.* And even if petitioner were correct that Section 1227(a)(2)(B)(i) permits removal only when an alien's particular conviction bears a relationship to federally controlled substances, drug-paraphernalia convictions would meet that standard. As the BIA has reasonably concluded, because drug-paraphernalia statutes prohibit possession of tools for drug use and distribution that are not limited in their utility to a single substance, convictions under such statutes therefore relate to federally controlled drugs and state-controlled drugs alike.

A. The Kansas Controlled-Substance Statutes Are Laws "Relating To" Federally Controlled Substances

The INA's controlled-substance removal provision, 8 U.S.C. 1227(a)(2)(B)(i), permits the removal of an alien who violates the Kansas controlled-substance laws, because a state drug law relating to hundreds of federally controlled substances and a small number of additional, similar substances is a "law * * * of a State * * * relating to a controlled substance (as defined in section 802 of title 21)."

1. The text, structure, and purpose of Section 1227(a)(2)(B)(i) establish its applicability

a. Statutory interpretation begins "with the language of the statute itself." *Caraco Pharm. Labs., Ltd.* v. *Novo Nordisk A/S*, 132 S. Ct. 1670, 1680 (2012) (citation omitted). In analyzing statutory text, words carry "their ordinary, contemporary, common meaning" unless they are otherwise defined. *Octane Fitness, LLC* v. *ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014) (citation omitted); see also, *e.g.*, *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563, 573 (2010) ("[W]e begin by looking at the terms of the provisions and the 'commonsense conception' of those terms.") (citation omitted).

Petitioner's conviction for violating a Kansas drug-paraphernalia statute is a violation of a state law "relating to" a federally controlled substance within the ordinary meaning of that phrase. "The ordinary meaning" of "relating to" "is a broad one." *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992). A statute is one "relating to" a subject if it "stand[s] in some relation," "ha[s] bearing or concern," "pertain[s]," or "refer[s]" to the subject. *Ibid.* (quoting *Black's Law Dictionary* 1158 (5th ed. 1979)); see *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983) ("A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan."); see also *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 739 (1985) (same). The term is not "limitless," *Celotex Corp.* v. *Edwards*, 514 U.S. 300, 308 (1995), and a "tenuous, remote, or peripheral" connection will not suffice," *Trans World Airlines*, 504 U.S. at 390 (citation omitted). Nevertheless, this Court has explained,

the phrase "relating to" has a "broad common-sense meaning" and "expansive sweep." *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 47 (1987) (citation omitted).

The Kansas controlled-substance statutes are laws "relating to" federally controlled substances under the meaning given to that phrase in this Court's decisions. Indeed, Kansas's drug statutes were specifically designed to "relat[e] to" federally controlled substances, because they enact a model statute created to "complement" and form an "interlocking trellis" with the federal controlled substance regime. See *Presidential Message* 514. And because Kansas's drug statutes principally apply to federally controlled substances, the statutes do indeed "ha[ve] a connection with or reference to," *Shaw*, 463 U.S. at 97, "have bearing or concern" on, and "pertain" to federally controlled substances, *Trans World Airlines*, 504 U.S. at 383 (citation omitted). Further, because federally scheduled drugs comprise virtually all of the substances regulated by Kansas's drug laws, the connection between Kansas's law and federally controlled substances is especially tight, not "peripheral" or "tenuous."

This application of the ordinary definition of "relating to" comports with common usage. For example, a student asked to select classes from a course catalog "relating to" copyright law would surely pick out an introduction to intellectual property (even if the class also covered trademarks and patents). So too, a legislative aide asked to identify the laws in a state code "relating to" heroin (for example) would surely pick out laws banning possession and distribution of heroin and of associated paraphernalia—even if the statutes in question also banned drug-related activities with respect to certain other substances. In sum, because a

statute of this type "ha[s] bearing or concern" on and "pertain[s]" to federally controlled substances in a direct and intended manner, see *Trans World Airlines*, 504 U.S. at 383, a person convicted of violating the controlled-substance statutes of Kansas has committed "a violation of * * * [a] law * * * of a State * * * relating to a controlled substance (as defined in section 802 of title 21)," 8 U.S.C. 1227(a)(2)(B)(i).

Given the virtually complete overlap between Kansas's controlled-substance schedules and the federal schedules, petitioner does not appear to dispute that a violation of Kansas's drug-paraphernalia statute is a violation of a law "relating to" a federally controlled substance. See Pet. Br. 12. Instead, he asserts that Congress required not that a person be convicted under a *law or regulation* relating to a federally controlled substance, but rather that a person be convicted of a *criminal act* relating to a federally controlled substance.

That reading, however, violates ordinary canons of interpretation. As this Court has explained, "a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 343 (2005) (quoting *Barnhart* v. *Thomas*, 540 U.S. 20, 26 (2003)); *Federal Trade Comm'n* v. *Mandel Bros., Inc.*, 359 U.S. 385, 389-390 (1959). A limiting phrase, in particular, ordinarily modifies "[t]he last antecedent," or "the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence," absent contrary indicia of statutory meaning. 2A Norman J. Singer & Shambie Singer, *Statutes and Statutory Construction* § 47:33, at 494-496 (7th ed. 2014)

(citation omitted). Here, the "last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence," *id.* at 495-496, is "any law or regulation of a State, the United States, or a foreign country," 8 U.S.C. 1227(a)(2)(B)(i). Accordingly, Section 1227(a)(2)(B)(i) is best read to permit removal of any alien who violates a "law or regulation of a State, the United States, or a foreign country" relating to a federally controlled substance. *Ibid.*

By contrast, the text of Section 1227(a)(2)(B)(i) does not permit petitioner's reading, because there is no prior antecedent that the "relating to" clause could modify that would yield petitioner's view of the statute. While petitioner does not explain what phrase he believes the "relating to" limitation modifies, the only apparent candidate is "violation (or a conspiracy or attempt to violate)." 8 U.S.C. 1227(a)(2)(B)(i). But the "relating to" language could not modify those terms. While it may be possible (although quite strained) to speak of a "violation [relating to a controlled substance] of * * * any law or regulation" it is not possible to speak of a "conspiracy or attempt to violate [relating to a controlled substance] * * * any law or regulation." The only antecedent that can be modified by the "relating to" clause, consistent with ordinary grammar, is "law or regulation of a State, the United States, or a foreign government." See *ibid.*

b. The broader context of Section 1227 reinforces the conclusion that it is appropriate to give the controlled-substance-removal provision its ordinary textual reading. When Congress sought in particular subsections of Section 1227 to tie removal to convictions for particular acts, it said so. For instance, a firearms-related provision makes an alien removable

for certain convictions involving a weapon which "*is* a firearm or destructive device (as defined in section 921(a) of title 18)"—rather than for convictions under laws relating to firearms or explosive devices. 8 U.S.C. 1227(a)(2)(C) (emphasis added). And a domestic-violence-related provision makes aliens removable if convicted of certain crimes that "ha[ve] as an element" "the use, attempted, or threatened use of physical force against the person * * * of another," 18 U.S.C. 16(a)—rather than if convicted under laws relating to the conduct in question. 8 U.S.C. 1227(a)(2)(E) (providing for removal of aliens convicted of such offenses when the victim was a spouse or domestic partner). The controlled-substance-removal provision, with its language centering on whether a conviction was for a violation of a *law* relating to a controlled substance, should not be read—as petitioner would have it—to command the type of link between conviction and conduct that Congress elsewhere enacted through different language. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (explaining that principles of statutory interpretation counsel against "concluding * * * that the differing language in the two subsections has the same meaning in each").

Comparison with the aggravated-felony provision provides additional support for this conclusion. In contrast to the broad language that Congress used in Section 1227(a)(2)(B)(i) to define the convictions that make an alien removable, Congress used narrow language when it defined the drug crimes that constitute aggravated felonies, conviction of which not only renders an alien removable but also ineligible for cancellation of removal. See 8 U.S.C. 1229b(a). For a drug crime to qualify as an "aggravated felony," Congress

required that a conviction match—rather than merely be under a law "relating to"—a particular statutory definition. See 8 U.S.C. 1227(a)(2)(A)(iii) (providing that "[a]ny alien who *is convicted of*" an aggravated felony is deportable) (emphasis added); 8 U.S.C. 1101(43)(B) (enumerating aggravated felonies, including "illicit trafficking in a controlled substance (as defined in section 802 of title 21)"). This contrast underscores that "[i]f Congress wanted a one-to-one correspondence between the state laws and the federal CSA, it would have used a word like 'involving' instead of 'relating to,' or it could have written the [removability] statute the way it wrote" the aggravated-felony provision. *Desai* v. *Mukasey*, 520 F.3d 762, 765 (7th Cir. 2008). Congress's use of different language indicates that it intended the result its language produces: A broad sweep for the provision regarding removability, as to which discretionary relief remains possible, and a narrow sweep for the provision that triggers ineligibility for discretionary relief.

Controlled-substance-related provisions that petitioner identifies elsewhere in the INA further support giving the controlled-substance-removal provision its ordinary textual reading. Petitioner cites (Br. 17) several provisions that trigger immigration consequences only upon a showing that a particular *conviction* involves federally controlled substances—in contrast to Section 1227's triggering of immigration consequences when an alien violates a *law* relating to a controlled substance. See 8 U.S.C. 1184(d)(3)(B)(iii) and (r)(5)(B)(iii) (providing for denial of visas to applicants with "[a]t least three convictions for *crimes* relating to a controlled substance or alcohol not aris-

ing from a single act") (emphasis added); 8 U.S.C. 1375a(d)(2)(B)(iv) (requiring certain certifications with respect to any "Federal, State, or local arrest or conviction * * * for *offenses* related to controlled substances or alcohol") (emphasis added). Those sections confirm that when Congress wants proof that a particular offense involved a federally controlled substance, Congress says so.[4]

c. This plain-language reading of Section 1227(a)(2)(B)(i) reflects time-honored purposes and avoids irrational disparities. See *Abramski* v. *United States*, 134 S. Ct. 2259, 2267 (2014) (explaining that statutory terms must be interpreted "with reference to the statutory context, 'structure, history, and purpose'") (citation omitted). Giving the text of Section 1227(a)(2)(B)(i) its ordinary meaning, the provision protects public safety by ensuring that the Attorney General has the authority to order the removal of aliens who are convicted of drug crimes—even when federal and state drug schedules are not perfectly overlapping. Indeed, this Court has repeatedly expressed the understanding that the controlled-

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[4] Petitioner cites these provisions because he believes they establish that Congress would have used language such as "crimes relating to a controlled substance or alcohol" if it wished to allow for the removal based on state statutes that encompass federally controlled substances and similar additional substances (see Pet. Br. 17), but he is mistaken. Petitioner's proposed alternative language—referring to aliens convicted of "crimes relating to a controlled substance or alcohol"—reaches a different class of individuals than language referring to aliens convicted under any law "relating to" a federally controlled substance. That Congress referred to "crimes relating to a controlled substance or alcohol" in other provisions thus suggests simply that it intended to reach different conduct in those provisions.

substance-removal provision grants the Attorney General authority to remove those convicted of state crimes involving federally controlled drugs. See *Carachuri-Rosendo*, 560 U.S. at 581 (stating that although state drug conviction did not qualify as aggravated felony, an alien convicted of possessing controlled substances "will not avoid the fact that his conviction makes him, in the first instance, removable"); *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1692 (2013) (noting that "[a]ny marijuana distribution offense * * * will * * * render a noncitizen deportable as a controlled substances offender").

By providing that aliens who commit violations of state drug laws are removable, notwithstanding some variations in state law, Congress aligned the removal provisions with other statutes premised on the recognition that drug crimes have "a substantial and detrimental effect on the health and general welfare of the American people." 21 U.S.C. 801(2), (3) and (4); see *National Treasury Emps. Union* v. *Von Raab*, 489 U.S. 656, 674 (1989) (noting that "drug abuse is one of the most serious problems confronting our society today"); *Harmelin* v. *Michigan*, 501 U.S. 957, 1003 (1991) (Kennedy, J., concurring in part) (noting "pernicious effects of the drug epidemic" and the "direct nexus between illegal drugs and crimes of violence").

Petitioner's approach, in contrast, would undercut the Attorney General's ability to remove aliens for drug offenses in States that, consistent with the UCSA, proscribe both federally controlled drugs and a small number of additional substances. The government would frequently lack the authority to remove aliens, such as petitioner, based on convictions for paraphernalia crimes in States adhering to the

UCSA approach. See Nat'l Immigrant Justice Ctr. Amicus Br. 29 (noting that many States do not require proof of identity of substance involved in paraphernalia crimes, so that conviction records would not establish whether federally controlled substance was involved); NACDL Amicus Br. 10 (same). The government would also lack removal authority under petitioner's approach with respect to some aliens convicted of possession and distribution offenses, because States do not uniformly require the identity of the substance involved in such crimes to be charged or proven. See, *e.g.*, *In re De Jesus Rodriguez*, 2009 WL 2437164, at *2 (B.I.A. July 30, 2009) (conviction records for state drug-conspiracy crime did not reflect identity of substance); *In re Gonzalez-Chavez*, 2006 WL 901378, at *2 (B.I.A. Feb. 23, 2006) (conviction records for drug-possession crime specified only that substance was narcotic drug); *In re Medel-Navarro*, 2005 WL 698568, at *2 (B.I.A. Feb. 9, 2005) (per curiam) (conviction records for state crime of possession of controlled substance for sale did not reflect particular substance involved); *In re Beckford*, 22 I. & N. Dec. 1216, 1217 (B.I.A. 2000) (conviction records for state possession with intent to sell did not reflect particular substance involved).

It is implausible to suppose that when Congress enacted a removal provision reaching state drug crimes, against the backdrop of UCSA-based enactments contemplating substantial overlap but some minor variation in scheduling, Congress intended to deny the Attorney General the authority to order the removal of aliens convicted of those crimes. Indeed, it is particularly unlikely that Congress would have intended that result even as it permitted the Attorney

General to order the removal of aliens for non-criminal conduct and less serious crimes. See, *e.g.*, 8 U.S.C. 1227(a)(5) (permitting removal of alien who becomes a public charge); 8 U.S.C. 1227(a)(3)(A) (permitting removal of alien for failure to notify the government of a change of address); *Padilla* v. *Kentucky*, 559 U.S. 356, 379 (2010) (Alito, J., concurring in the judgment) (noting that removable crimes involving moral turpitude may include writing bad checks and knowingly driving with a revoked license).

By providing for the removal of aliens who violate state laws relating to federally controlled substances even when state schedules do not perfectly mirror those in federal law, Congress served the further objective of avoiding disparities that have no relationship to culpability. Permitting removal only of those aliens whose state conviction records establish involvement of a federally controlled substance would generate disparities among those who committed identical crimes in different States. Some aliens would be non-removable for crimes involving federally controlled drugs simply because they were convicted in a State that also controlled additional substances. Petitioner's approach would also generate disparities within States that control some non-federally controlled drugs, depending on whether a prosecution for a crime involving a federally controlled drug was brought by state or federal authorities. And because the UCSA and federal law each contemplates adjustments to drug schedules over time—which may bring individual States in and out of perfect alignment with federal law—petitioner's approach would mean that offenders within a State would face different immigra-

tion consequences depending on the timing of their crimes.

Petitioner contends (Br. 10) that Congress must not have intended to permit removal based on all violations of state laws relating to federally controlled substances because that approach itself produces disparities. But those disparities are not among similarly situated offenders. Subjecting aliens to different immigration consequences for conduct involving a drug depending on whether the drug was prohibited in the jurisdiction where the alien acted is entirely reasonable; it separates aliens who have committed drug crimes from those who have not. And in any event, because of the extent of the overlap between federal and state schedules, petitioner's own research suggests that state criminal prosecutions involving substances that are not federally controlled are exceedingly rare in States adopting a UCSA approach. See Pet. Br. 51-55 (identifying only one instance of Kansas prosecution for non-federally controlled substance and only a handful of possible prosecutions involving such substances in other States).

2. Petitioner's arguments do not justify a different reading of Section 1227(a)(2)(B)(i)

None of petitioner's arguments justifies departing from ordinary grammatical rules or from the commonsense meaning of the removal provision's terms.

Petitioner first suggests (Br. 15, 18) that his reading is necessary to save from superfluity the parenthetical referring to controlled substances "as defined in section 802 of title 21." Petitioner is mistaken. Absent a more precise definition, the term "controlled substance" naturally refers to "[a]ny type of drug whose possession and use is regulated by law."

Black's Law Dictionary 378-379 (9th ed. 2009). As a result, without the parenthetical, Section 1227(a)(2)(B)(i) would render removable aliens who violate myriad state and federal regulations concerning the medicines and pharmaceuticals that—absent a definitional parenthetical—might well be described as "controlled substances." The parenthetical makes plain that such violations are not within the statute's ambit, and permits the institution of removal proceedings only if an alien has violated the serious criminal prohibitions that apply to both federally controlled substances and—in a number of UCSA States—a small number of additional drugs that the State has concluded present a similar danger.

Petitioner next contends (Br. 18) that Section 1227(a)(2)(B)(i) must have been intended to render removable only aliens whose conviction records establish that they committed an *act* relating to a federally controlled substance because of its use of the singular in referring to any alien convicted of "a violation of * * * any law * * * relating to *a* controlled substance (as defined in section 802 of title 21)." 8 U.S.C. 1227(a)(2)(B)(i) (emphasis added). The use of the singular, however, tracks the definition in Section 802 of Title 21—it is the term "controlled substance," not the term "controlled substances," that Section 802 defines. See 21 U.S.C. 802(6) ("The term 'controlled substance' means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter."). And Congress's use of language that tracks the definitional provision does not alter the provision's meaning because, pursuant to the Dictionary Act, 1 U.S.C. 1, "unless the context indicates otherwise—words importing the singular

include and apply to several persons, parties, or things." *Ibid.*

Nor is petitioner correct that his reading is "confirmed" by the clause that creates an exception to removability for "a single offense involving possession for one's own use of 30 grams or less of marijuana." Pet. Br. 14-16 (quoting 8 U.S.C. 1227(a)(2)(B)(i)). "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Hillman* v. *Maretta*, 133 S. Ct. 1943, 1953 (2013) (quoting *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980)). It is unsurprising that Congress created an exception limited to a single common drug about which Congress could make a substance-specific risk assessment, without also creating an exception for the smaller subset of cases that involve substances controlled only under state law. That is a class of drugs about which no similar substance-specific risk assessment can be made. State-scheduled substances may include, for example, dangerous drugs with respect to which States have simply been quicker to act. Cf. DEA, *National Drug Threat Assessment Summary* 14 (2013) (noting "fast growing threat" of synthetic cannabinoids); 2010 Kan. Sess. Laws 50 (banning synthetic cannabinoids including JWH-018 and JWH-073); 76 Fed. Reg. at 11,075 (temporarily scheduling synthetic cannabinoids including JWH-018 and JWH-073).

In any event, the structure of the marijuana exception undermines petitioner's reading of Section 1227(a)(2)(B)(i) as excluding convictions under entire state drug statutes. When Congress sought to bar removal based on convictions involving a particular

substance—marijuana—it did not carve out convictions under entire statutes, but rather enacted a circumstance-specific exception that requires an examination of the conduct that led to conviction. See *In re Davey*, 26 I. & N. Dec. 37, 39 (B.I.A. 2012) (noting that the "exceedingly narrow and fact-specific" language of the marijuana exception "calls for * * * a 'circumstance-specific' inquiry * * * into the nature of the alien's conduct"). This structure ensures that those who commit drug offenses involving substances other than marijuana possessed for personal use remain subject to removal. It is implausible that Congress would have taken this narrow and circumstance-specific approach concerning marijuana and yet carved out state-controlled substances in a manner that would have the effect of also carving out state convictions involving drugs in the heartland of the federal controlled-substance schedules.

Lastly, petitioner is incorrect to suggest (Br. 33-34) that the history of the controlled-substance-removal provision supports his view. Over the years, Congress has modified the controlled-substance removal provision on a number of occasions, generally with the effect of expanding its scope. See, *e.g.*, Narcotics Control Act of 1956 (1956 Act), Pub. L. No. 84-728, § 301, 70 Stat. 575; Act of July 14, 1960, Pub. L. No. 86-648, § 9, 74 Stat. 505. The Anti-Drug Abuse Act of 1986 on which petitioner focuses, was one such broadening amendment, authorizing removal of aliens convicted of violating any law relating to any of the substances on the federal drug schedules. See Pub. L. No. 99-570, Tit. I, Subtit. M, § 1751, 100 Stat. 3207-47 (replacing with reference to "a controlled substance (as defined in section [802 of title 21])" references to

"opium, coca leaves, heroin, marihuana, or any salt derivative or preparation of opium or coca leaves, or isonipecaine or any addiction-forming or addiction-sustaining opiate" and to "narcotic drugs or marihuana"); see also § 9, 74 Stat. 505.[5] The 1986 revision ensured that all convictions for violations of laws relating to any of the substances in the federal schedules are covered—not simply convictions under laws relating to a narrower subset of substances. Nothing in this revision suggests, however, that when a conviction is under a statute governing *both* federally controlled substances and some additional drugs, Congress intended to foreclose an alien's removal. As noted above, the language that Congress enacted indicates Congress intended to permit removal in such cases. And the inclusion of the relevant language in the Anti-Drug Abuse Act of 1986—an enactment that generally toughened the treatment of drug crimes, including through increased penalties and a ban on controlled substance analogs—makes petitioner's

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[5] The prior version of the statute permitted removal of any person "who at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or who has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction-sustaining opiate." See 1956 Act § 301, 70 Stat. 575.

reading even less plausible. See § 1751, 100 Stat. 3207-47.

3. Cases concerning the categorical approach support application of Section 1227(a)(2)(B)(i) to petitioner

Giving Section 1227(a)(2)(B)(i) the meaning indicated by its language, structure, and purpose is consistent with decisions describing what is often referred to as the "categorical" approach to identifying qualifying convictions. See, *e.g.*, *Descamps* v. *United States*, 133 S. Ct. 2276, 2283 (2013). Statutes that speak of whether convictions meet certain criteria typically call for a "categorical" analysis examining "the statutory definitions of the prior offenses," not "the particular facts underlying those convictions." *Taylor* v. *United States*, 495 U.S. 575, 600 (1990); see *Descamps*, 133 S. Ct. at 2287 (explaining that reference to "conviction" acts "as an on-off switch, directing that a prior crime would qualify as a predicate offense in all cases or in none"). Courts assess whether the conviction—defined by a statutory definition—falls within a category established in federal law. This approach establishes petitioner's removability under Section 1227: An examination of the "statutory definition[]" of petitioner's crime, *id.* at 2283, reveals that petitioner was convicted of violating a "law or regulation of a State * * * relating to a controlled substance (as defined in section 802 of title 21)." 8 U.S.C. 1227(a)(2)(B)(i). No examination of "the particular facts underlying [his] conviction[]" is involved. *Descamps*, 133 S. Ct. at 2283 (citation omitted).

When petitioner suggests that the categorical approach requires that "a section-802 substance *must be an element* underlying a State conviction" to allow removal, Pet. Br. 22 (emphasis added), he disregards

the statutory text, as explained above, and substitutes an analysis that the categorical approach does not require. Section 1227(a)(2)(B)(i) requires only that the conviction be under a "law or regulation of a State * * * relating to a" federally controlled substance—not that a federally controlled substance must be an element of each crime under the statute. This Court has applied the categorical approach with attention to what the relevant definition in federal law actually demands. When the definition demands less than a one-to-one correspondence between state law and federal elements, the Court has understood the categorical approach to implement the text, not to trump it. See *James* v. *United States*, 550 U.S. 192, 208 (2007) (explaining that determination whether crime, under categorical approach, "presents a serious potential risk of injury to another" turns on whether "the conduct encompassed by the elements of the offense, *in the ordinary case*," presents that risk, notwithstanding that there may be instances in which crimes defined by elements "do not present" the risk) (emphasis added). The statute here requires only that the conviction was under a law relating to federally controlled substances, and the categorical approach requires nothing more.[6]

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[6] This Court's categorical-approach decisions suggest that even if the statutory text called for each state drug conviction to relate to a federally controlled substance, convictions under Kansas's drug statutes may categorically qualify. This Court has explained that there must be "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside" a definition in federal law in order for convictions under the state statute to fall outside the generic definition. *Moncrieffe*, 133 S. Ct. at 1684-1685 (quoting *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). The listing of additional drugs on Kansas's controlled-

B. A Conviction Under The Kansas Law Prohibiting Possession of Drug Paraphernalia, In Particular, Is A Removable Offense Under Section 1227(a)(2)(B)(i)

It is particularly clear that criminal possession of drug paraphernalia qualifies as a removable offense. As the Board has explained, tools of drug distribution and use are not limited to any particular substance. Possession of those tools is instead "conduct associated with the drug trade in general," *In re Martinez Espinoza*, 25 I. & N. Dec. 118, 121 (B.I.A. 2009), and therefore relates to both federally controlled drugs and other controlled substances.

1. The conduct prohibited under the instant Kansas drug-paraphernalia statute relates to federally controlled substances because that statute bans possession of tools of the drug trade that facilitate drug

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substance schedules establishes a theoretical possibility that Kansas would apply its statutes to conduct involving substances that are not federally controlled. But even petitioner's own exhaustive search has identified no Kansas paraphernalia prosecutions involving non-federally-controlled substances, and only a single case in which Kansas brought a drug prosecution of any type involving a substance that was not federally controlled. See Pet. Br. 52 (identifying a prosecution for a synthetic cannabinoid, approximately one month before that cannabinoid was federally controlled). This evidence supports the court of appeals' assessment that "there is little more than a 'theoretical possibility' that a conviction for a controlled substance offense under Kansas law will *not* involve a controlled substance as defined in 21 U.S.C. § 802." Pet. App. 5 (quoting *Duenas-Alvarez*, 549 U.S. at 193). However, since Section 1227(a)(2)(B)(i), by its express terms, contemplates a less-than-complete alignment between federal and state controlled-substance schedules, this Court need not decide whether—as petitioner asserts—the listing of additional substances on a State's drug schedules, or the fact of a single prosecution, would undermine a categorical match under a provision requiring one.

crimes involving federally controlled substances and other drugs alike. Like the other States that have adopted the Model Drug Paraphernalia Act, Kansas seeks to combat drug distribution and use by combatting the tools that facilitate those crimes. Those tools are defined under Kansas law—drawing from the language of the Model Drug Paraphernalia Act—to include "all equipment and materials of any kind which are used, primarily intended for use, or designed for use" in a variety of drug-related activities, from planting and preparing drugs, to storing and concealing them, to ingesting or otherwise introducing them into the human body. See Kan. Stat. Ann. § 21-5701(f) (Supp. 2013). In keeping with the Model Drug Paraphernalia Act, Kansas makes it unlawful "for any person to use or possess with intent to use" any item of drug paraphernalia to "store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance," as defined under Kansas law, "into the human body." *Id.* § 21-5709(b); see *id.* § 21-5701.

Paraphernalia offenses necessarily are ones "relating to" federally controlled substances because paraphernalia offenses "stand in some relation" "have bearing or concern," and "pertain" to or have "association with or connection with" federally controlled drugs. *Trans World Airlines*, 504 U.S. at 383 (citation omitted). Tools designed for use, primarily intended for use, or used in "storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body" a controlled substance, Kansas Stat. Ann. § 21-5701(f) (Supp. 2013), are not limited in their utility to any single substance; rather, they can be used to facilitate the use of, or trade in, a variety of drugs. Thus, as the Board has concluded, drug para-

phernalia crimes are properly regarded as crimes relating to "the drug trade in general"—including the sale and consumption of federally controlled drugs—rather than related only to any single substance. See *Martinez Espinoza*, 25 I. & N. Dec. at 121.

2. Petitioner's argument that paraphernalia offenses are not related to federally controlled substances is mistaken. Petitioner principally objects (Br. 32-33) that Kansas's paraphernalia law, like those of all States adopting the Model Drug Paraphernalia Act, reaches ordinary household objects when they serve as tools used or intended to be used in "storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body" a controlled substance. Kansas Stat. Ann. § 21-5701(f) (Supp. 2013). But this is not an objection to the critical point that tools for drug use or distribution can just as readily be used for federally controlled substances as for state-controlled drugs. Rather, it is an objection to the legislature's choice to treat household objects as items that criminally facilitate the drug trade at all—even when those objects were used for, or intended to be used for, consumption or distribution of federally controlled drugs alone.

Petitioner's belief that household objects repurposed as drug tools are not appropriately classified as tools that facilitate the drug trade is at loggerheads with the conclusions of the state and federal governments that have studied the drug-paraphernalia problem. The drafters of the Model Drug Paraphernalia Act defined paraphernalia broadly—to encompass ordinary objects used or intended for use as tools of drug use or distribution—because the drafters found that narrower laws with more restrictive definitions

had been "too limited in coverage * * * to be very effective." See 1979 Hearing 88 (Model Drug Paraphernalia Act, Prefatory note); see also *id.* at 91 (Art. I cmt.) (explaining broad definition was needed to avoid "major loopholes in the Act's coverage"). Legislators thus deliberately included dual-use household objects devoted to criminal purposes. See *id.* at 92 (explaining that "a spoon, a hypodermic syringe, and a length of surgical tubing" were properly classed as drug paraphernalia when used to melt and inject a drug, even though they were also items with "legitimate uses in the community"); *id.* at 89 (Art. I(9) and (10) (definitions)) (explaining that "balloons, envelopes and other containers used, intended for use, or designed for use" in packaging drugs and "[c]ontainers and other objects used, intended for use, or designed for use" in storing or concealing controlled substances would be covered). These statutes therefore rest on a considered judgment that household objects used or intended for use as tools of drug consumption or distribution *do* facilitate drug crimes. Since the utility of such objects is, as the Board puts it, as tools of the drug trade in general—not limited to any single drug—possession of drug paraphernalia is a crime related to federally controlled substances.

Petitioner also suggests (Br. 32) that state drug-paraphernalia crimes are not violations of laws relating to federally controlled substances because the federal paraphernalia statute targets a narrower range of conduct than the law based on the Model Drug Paraphernalia Act enacted in Kansas. He notes that federal law makes criminal only the distribution and sale of paraphernalia—not simple possession—and contains its own paraphernalia definition based

on, but somewhat narrower than, the definition in the Model Drug Paraphernalia Act. *Ibid.*; see 1986 Hearing 15 (sponsor explaining that federal paraphernalia definition was "drafted closely after the model Drug Paraphernalia Act").

Those differences are not relevant under Section 1227(a)(2)(B)(i), however, because that provision makes removable an alien "convicted of a violation of * * * *any* law or regulation of a State * * * relating to a controlled substance," 8 U.S.C. 1227(a)(2)(B)(i) (emphasis added), without requiring that the conduct proscribed also be criminal under federal law. See *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (citation omitted). That is unsurprising, for limits on the scope of federal prohibitions can reflect resource constraints and federalism considerations. See 1979 Hearing 87-88 (statement of Department of Justice official that paraphernalia was appropriately addressed through state and local legislation in light of limited federal enforcement resources); 1986 Hearing 16 (statement of federal act's sponsor that state drug-paraphernalia laws "have been quite effective" but that federal law was necessary because "the success of that legislation on the State level has wrought a Federal problem, the Federal problem being that paraphernalia dealers who can no longer utilize intrastate commerce are now turning to interstate commerce"). In any event, petitioner did not raise in the court of appeals or in his petition for certiorari a challenge to the use of paraphernalia-possession convictions to trigger removability as a general matter; instead, he asserted only that

removal turns on a nexus between state paraphernalia-possession convictions and federally scheduled drugs. See Pet. App. 9 (noting that petitioner had not contended that state paraphernalia offenses, as a general matter, do not relate to controlled substances); Pet. i (raising question concerning whether conviction records must establish link between paraphernalia and federally controlled substance).

C. Any Ambiguity Should Be Resolved In Favor Of The Board's Reasonable Interpretation

For the reasons set out above, Section 1227(a)(2)(B)(i), properly read, provides for the removal of aliens who violate drug-paraphernalia laws in States that outlaw both federally controlled drugs and a small number of additional substances. To the extent that the Court finds that section ambiguous, however, deference is warranted under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 845 (1984), to the Board's reasonable interpretation.

1. Principles of Chevron *deference apply*

"Principles of *Chevron* deference apply when the BIA interprets the immigration laws." *Scialabba* v. *Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) (plurality opinion); *id.* at 2214-2216 (Roberts, C.J., concurring in the judgment) (deferring to Board under *Chevron*); see *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999); see also *Negusie* v. *Holder*, 555 U.S. 511, 516-517 (2009). Under *Chevron*, courts defer to the Board's interpretation of the INA unless the interpretation is "clearly contrary to the plain and sensible meaning of the statute," *Mota* v. *Mukasey*, 543 F.3d 1165, 1167 (9th Cir. 2008), such that it is "not one that

Congress would have sanctioned," *Chevron*, 467 U.S. at 845 (citation omitted).

Petitioner seeks (Br. 35) to carve out an exception to deference for cases in which the Board uses the "categorical approach" to determine if a state crime meets a federal statutory definition. There is no basis for such an exception. This case turns on the construction of a term in the INA—in particular, the phrase "a violation of * * * any law * * * of a State * * * relating to a controlled substance (as defined in section 802 of title 21)." 8 U.S.C. 1227(a)(2)(B)(i). Because this term falls within a statute that the Attorney General is entrusted with administering, and for which the Attorney General has vested interpretive authority in the Board, the prerequisite for deference to the Board exists here. See *Scialabba*, 134 S. Ct. at 2203 (plurality opinion); *Aguirre-Aguirre*, 526 U.S. at 424-426. That this is a case involving the categorical approach—a method for assessing whether a state crime *meets* a federal definition—does not settle the appropriate construction of the federal definition itself.

Petitioner offers no reason why deference to the Board's construction of a term in the INA should be altered by use of the categorical approach, but he suggests such an exception is implicit in this Court's decisions. See Pet. Br. 35. Petitioner is mistaken. Four of the decisions that petitioner cites as declining to defer to a Board interpretation did not turn on the meaning of a term in the INA, but rather on the meaning of a term in the criminal code that the INA cross-referenced. See *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (construing "crime of violence" in 18 U.S.C. 16, "a criminal statute"); *Carachuri-Rosendo*,

560 U.S. at 581 ("[T]he critical language appears in a criminal statute, 18 U.S.C. § 924(c)(2)."); *Moncrieffe*, 133 S. Ct. at 1683 (interpreting same term); *Lopez* v. *Gonzales*, 549 U.S. 47, 50 (2006) ("The question raised is whether conduct made a felony under state law but a misdemeanor under the Controlled Substances Act is a 'felony punishable under the Controlled Substances Act.' 18 U.S.C. 924(c)(2)"). While the Board is entitled to deference concerning terms in the INA, it is not entitled to deference concerning the meaning of criminal statutes. See *Abramski*, 134 S. Ct. at 2274 ("[C]riminal laws are for courts, not for the Government, to construe."); *Leocal*, 543 U.S. at 384 n.8 (noting criminal provisions must carry same meaning in criminal and noncriminal contexts).

The remaining decisions of this Court that petitioner cites (Br. 35) simply adopted the government's reading of an INA provision, after briefing in which the government argued principally that its view was unambiguously correct. See *Nijhawan* v. *Holder*, 557 U.S. 29, 32 (2009); *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 185 (2007); *Kawashima* v. *Holder*, 132 S. Ct. 1166, 1171-1172 (2012).[7] Those decisions did not suggest that this Court found the relevant provisions ambiguous. And they did not qualify the Court's past holdings that the Board is entitled to deference in construing the INA. Finally, petitioner is mistaken in suggesting (Br. 35) that the Board itself has "recognized" the limitation he asserts. The Board has

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[7] In *Kawashima* and *Duenas-Alvarez*, the Board had not yet issued a precedential construction of the provision at issue that resolved the question in dispute. See Gov't Br. at 43 n.19, *Kawashima*, *supra* (No. 10-577); Gov't Br. at 19 n.12, *Duenas-Alvarez*, *supra* (No. 05-1629).

acknowledged that it is bound by *Descamps* and other federal precedent concerning the method for determining whether a criminal statute is divisible, but it has not suggested that it lacks the authority to construe ambiguous terms in the INA in categorical-approach cases. See *In re Chairez-Castrejon*, 26 I. & N. Dec. 349 (B.I.A. 2014).

2. The Board reasonably concluded that state drug-paraphernalia crimes are removable offenses

To the extent that the scope of the controlled-substance-removal provision is ambiguous, the Board's reasonable conclusion that drug-paraphernalia crimes trigger removal warrants deference. In a precedential decision, the Board reasonably concluded based on statutory text, precedent, and purpose that, at a minimum, state drug-paraphernalia statutes fall within the language of the controlled-substance removal provision because such statutes criminalize tools usable with multiple drugs. See *Martinez Espinoza*, 25 I. & N. Dec. at 119-121 (interpreting identical language in an admissibility provision, 8 U.S.C. 1182(a)(2)(A)(i)(II)).

Petitioner contends that the Board's approach reflects an unreasonable reading of the statute, because, he asserts, the Board "interpret[s] the same text to apply one way for possession and distribution offenses and another for paraphernalia offenses." Pet. Br. 37. But as the court of appeals' decision reflects, see Pet. App. 11, there is some uncertainty regarding the Board's current understanding of possession and distribution crimes. The Board held in 1965 that a California conviction for offering to sell a controlled substance could not lead to removal unless it was established that the drug involved in the crime was a

"narcotic" under federal law. *In re Paulus*, 11 I. & N. Dec. 274, 276 (B.I.A.). But "that case involved pre-1970 controlled substance and INA statutes," Pet. App. 11, and "preceded by decades the analysis and reasoning of cases" construing the term "relating to," *In re Huerta-Flores*, 2010 WL 5808899, at *4 (B.I.A. Aug. 27, 2010) (unpublished), review granted and remanded by *Huerta-Flores* v. *Holder*, No. 10-73389, 2014 WL 3361435 (9th Cir. July 10, 2014) (rejecting BIA's holding in *Huerta-Flores* under court of appeals' precedent). Recent decisions signal uncertainty concerning the precedential effect of that 1965 case. *Ibid.* Some unpublished decisions have expressed the view that *Paulus* remains authoritative in the context of distribution and possession convictions, see, *e.g.*, *In re Torres Sotelo*, 2007 WL 2074451 (B.I.A. June 18, 2007), and a recent published decision assumed the applicability of that framework, see *In re Ferreira*, 26 I. & N. Dec. 415, 422 (B.I.A. 2014), motion for reconsideration filed on October 22, 2014, albeit without considering the argument that the statutory provision requires only that the state law or regulation be one "relating to" a federally controlled substance.[8] But

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[8] DHS filed a motion for reconsideration in *Ferreira*, seeking, *inter alia*, clarification of the Board's position with respect to whether a state law prohibiting trafficking in controlled substances qualifies as a "law * * * of a State * * * relating to a controlled substance (as defined in section 802 of title 21)," 8 U.S.C. 1227(a)(2)(B)(i), when it proscribes both trafficking in numerous drugs that are federally controlled and trafficking in a small number of additional drugs. See DHS Mot. to Reconsider, *In re Ferreira*, *supra* (filed Oct. 22, 2014). The respondent submitted an opposition contending that reconsideration in his case is unwarranted because he is no longer removable under any construction of the controlled-substance removal ground, as a result of a state

another unpublished decision found an alien removable for a sale of an unspecified controlled substance in a State that criminalized several non-federally controlled substances. *Huerta-Flores*, 2010 WL 5808899. The decision in that case considered *Paulus* and found it inapplicable to distribution and possession crimes in States whose drug schedules were virtually identical to those in federal law. *Id.* at *4. While that decision is not precedential, as the court of appeals noted, it suggests that it is not settled within the Board whether *Paulus* governs with respect to distribution and possession offenses in States whose schedules largely mirror those in federal law.[9]

In any event, petitioner misunderstands the Board's decision in *Martinez Espinoza*. The Board

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court decision vacating his underlying drug conviction. Opp. to DHS Mot. to Reconsider, *In re Ferreira*, *supra* (filed Nov. 3, 2014). The Board has not yet acted on the motion for reconsideration.

[9] Because of this uncertainty, were the Court to find the statutory text ambiguous, and to determine that the case cannot be affirmed based on the reasoning of the Board specifically with respect to paraphernalia offenses, the appropriate course would be to remand the case to the Board to clarify whether, in its view, convictions for violations of state drug laws generally qualify as laws "relating to a controlled substance (as defined in section 802 of title 21)," 8 U.S.C. 1227(a)(2)(B)(i), when state law proscribes possession or trafficking of numerous drugs that are controlled substances as defined under federal law and also proscribes the possession or trafficking of a small number of additional drugs. That is because when the manner in which an expert agency would resolve an interpretive question is not clear, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'" *Negusie*, 555 U.S. at 523 (quoting *Gonzales* v. *Thomas*, 547 U.S. 183, 186 (2006) (per curiam)).

did not give the same text different meanings. Rather, it concluded that even if a conviction must itself be one "relating to" federally controlled substances to trigger removal, paraphernalia crimes categorically meet that standard, although possession crimes in States that control some non-federally controlled drugs do not. See *Martinez Espinoza*, 25 I. & N. Dec. at 121. This distinction, which has longstanding roots in the Board's precedent, is a reasonable one. See *id.* at 121-122 (discussing *In re Martinez-Gomez*, 14 I. & N. Dec. 104, 105 (B.I.A. 1972); *In re T-C-*, 7 I. & N. Dec. 100, 102 (B.I.A. 1956)). As noted above, paraphernalia statutes target tools that facilitate drug use and distribution—items that, by their nature, can be used with multiple substances, whether federally controlled or state controlled. See *id.* at 121 (noting that paraphernalia statutes proscribe "conduct associated with the drug trade in general," not conduct linked only to a "*particular* drug"). Indeed, paraphernalia merchants may facilitate drug use and distribution by selling such tools without having in mind any particular illegal substance at all. See 1979 Hearing 92 (Model Drug Paraphernalia Act, Art. I cmt.) (noting act has a "generalized" intent element, requiring defendant to "intend[] [an object] for use with illicit drugs" but not "pinpoint[] a specific time and place of future use"). In this way, paraphernalia crimes relate to the use and distribution of multiple controlled substances in a way that cannot be said of possession of non-federally controlled drugs themselves.

Petitioner's other attack on the Board's exercise of expert interpretive judgment is similarly refuted by the reasoned response that the Board offered. Peti-

tioner asserts (Br. 38-42) that it is unreasonable to classify drug-paraphernalia offenses as relating to federally controlled substances because doing so "would remove noncitizens for low-level offenses." Pet. Br. 38. But as the Board explained, Section 1227(a)(2)(B)(i) expressly contemplates the removal of aliens for "low-level" drug offenses. *Martinez Espinoza*, 25 I. & N. Dec. at 120. It makes removable "[a]*ny* alien who at *any* time after admission has been convicted of a violation of * * * *any* law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21)," other than those whose conduct involved personal use quantities of marijuana. 8 U.S.C. 1227(a)(2)(B)(i) (emphasis added). The exception for one particular lower-level drug crime—"a single offense involving possession for one's own use of 30 grams or less of marijuana"—reinforces the conclusion that, absent a specific exception, minor drug crimes render an alien removable. See *Martinez Espinoza*, 25 I. & N. Dec. at 120; *Hillman*, 133 S. Ct. at 1953 ("[W]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.") (citation omitted). In any event, petitioner's legal claim in this case has not been that paraphernalia crimes are too minor to trigger removal, but rather that removal is barred only for paraphernalia convictions in certain States whose drug laws extend to some non-federally controlled substances. See Pet. App. 9; Pet i. That proposed carve-out is not based on crime severity. At a minimum, the Board acted reasonably in rejecting petitioner's statutory construction.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 8 U.S.C. 1101(a) provides in pertinent part:

Definitions

(a) As used in this chapter—

* * * * *

(43) The term "aggravated felony" means—

* * * * *

(B) illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18);

* * * * *

2. 8 U.S.C. 1182 provides in pertinent part:

Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * * * *

(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general

* * * * *

[A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

* * * * *

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21),

is inadmissible.

* * * * *

3. 8 U.S.C. 1227(a) provides in pertinent part:

Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens.

* * * * *

(2) Criminal offenses

* * * * *

(B) Controlled substances

(i) Conviction

> Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

* * * * *

4. 8 U.S.C. 1229b(a) provides:

Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

5. 21 U.S.C. 811 provides in pertinent part:

Authority and criteria for classification of substances

* * * * *

(c) Factors determinative of control or removal from schedules

In making any finding under subsection (a) of this section or under subsection (b) of section 812 of this title, the Attorney General shall consider the following factors with respect to each drug or other substance proposed to be controlled or removed from the schedules:

(1) Its actual or relative potential for abuse.

(2) Scientific evidence of its pharmacological effect, if known.

(3) The state of current scientific knowledge regarding the drug or other substance.

(4) Its history and current pattern of abuse.

(5) The scope, duration, and significance of abuse.

(6) What, if any, risk there is to the public health.

(7) Its psychic or physiological dependence liability.

(8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter.

* * * * *

6. 21 U.S.C. 863 provides:

Drug paraphernalia

(a) In general

It is unlawful for any person—

(1) to sell or offer for sale drug paraphernalia;

(2) to use the mails or any other facility of interstate commerce to transport drug paraphernalia; or

(3) to import or export drug paraphernalia.

(b) Penalties

Anyone convicted of an offense under subsection (a) of this section shall be imprisoned for not more than three years and fined under title 18.

(c) Seizure and forfeiture

Any drug paraphernalia involved in any violation of subsection (a) of this section shall be subject to seizure and forfeiture upon the conviction of a person for such violation. Any such paraphernalia shall be delivered to the Administrator of General Services, General Services Administration, who may order such paraphernalia destroyed or may authorize its use for law enforcement or educational purposes by Federal, State, or local authorities.

(d) "Drug paraphernalia" defined

The term "drug paraphernalia" means any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or

otherwise introducing into the human body a controlled substance, possession of which is unlawful under this subchapter. It includes items primarily intended or designed for use in ingesting, inhaling, or otherwise introducing marijuana[1], cocaine, hashish, hashish oil, PCP, methamphetamine, or amphetamines into the human body, such as—

(1) metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(2) water pipes;

(3) carburetion tubes and devices;

(4) smoking and carburetion masks;

(5) roach clips: meaning objects used to hold burning material, such as a marihuana cigarette, that has become too small or too short to be held in the hand;

(6) miniature spoons with level capacities of one-tenth cubic centimeter or less;

(7) chamber pipes;

(8) carburetor pipes;

(9) electric pipes;

(10) air-driven pipes;

(11) chillums;

(12) bongs;

(13) ice pipes or chillers;

---

[1] So in original. Probably should be "marihuana."

(14) wired cigarette papers; or

(15) cocaine freebase kits.

(e) Matters considered in determination of what constitutes drug paraphernalia

In determining whether an item constitutes drug paraphernalia, in addition to all other logically relevant factors, the following may be considered:

(1) instructions, oral or written, provided with the item concerning its use;

(2) descriptive materials accompanying the item which explain or depict its use;

(3) national and local advertising concerning its use;

(4) the manner in which the item is displayed for sale;

(5) whether the owner, or anyone in control of the item, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

(6) direct or circumstantial evidence of the ratio of sales of the item(s) to the total sales of the business enterprise;

(7) the existence and scope of legitimate uses of the item in the community; and

(8) expert testimony concerning its use.

(f) Exemptions

This section shall not apply to—

(1) any person authorized by local, State, or Federal law to manufacture, possess, or distribute such items; or

(2) any item that, in the normal lawful course of business, is imported, exported, transported, or sold through the mail or by any other means, and traditionally intended for use with tobacco products, including any pipe, paper, or accessory.

7. Kansas Stat. Ann. § 21-5701 (Supp. 2013) provides in pertinent part:

Definitions. As used in K.S.A. 2013 Supp. 21-5701 through 21-5717, and amendments thereto: (a) "Controlled substance" means any drug, substance or immediate precursor included in any of the schedules designated in K.S.A. 65-4105, 65-4107, 65-4109, 65-4111 and 65-4113, and amendments thereto.

* * * * *

(f) "Drug paraphernalia" means all equipment and materials of any kind which are used, or primarily intended or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body a controlled substance and in violation of this act. "Drug paraphernalia" shall include, but is not limited to:

(1) Kits used or intended for use in planting, propagating, cultivating, growing or harvesting any

species of plant which is a controlled substance or from which a controlled substance can be derived;

(2) kits used or intended for use in manufacturing, compounding, converting, producing, processing or preparing controlled substances;

(3) isomerization devices used or intended for use in increasing the potency of any species of plant which is a controlled substance;

(4) testing equipment used or intended for use in identifying or in analyzing the strength, effectiveness or purity of controlled substances;

(5) scales and balances used or intended for use in weighing or measuring controlled substances;

(6) diluents and adulterants, including, but not limited to, quinine hydrochloride, mannitol, mannite, dextrose and lactose, which are used or intended for use in cutting controlled substances;

(7) separation gins and sifters used or intended for use in removing twigs and seeds from or otherwise cleaning or refining marijuana;

(8) blenders, bowls, containers, spoons and mixing devices used or intended for use in compounding controlled substances;

(9) capsules, balloons, envelopes, bags and other containers used or intended for use in packaging small quantities of controlled substances;

(10) containers and other objects used or intended for use in storing or concealing controlled substances;

(11) hypodermic syringes, needles and other objects used or intended for use in parenterally injecting controlled substances into the human body;

(12) objects used or primarily intended or designed for use in ingesting, inhaling or otherwise introducing marijuana, cocaine, hashish, hashish oil, phencyclidine (PCP), methamphetamine or amphetamine into the human body, such as:

(A) Metal, wooden, acrylic, glass, stone, plastic or ceramic pipes with or without screens, permanent screens, hashish heads or punctured metal bowls;

(B) water pipes, bongs or smoking pipes designed to draw smoke through water or another cooling device;

(C) carburetion pipes, glass or other heat resistant tubes or any other device used or intended to be used, designed to be used to cause vaporization of a controlled substance for inhalation;

(D) smoking and carburetion masks;

(E) roach clips, objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;

(F) miniature cocaine spoons and cocaine vials;

(G) chamber smoking pipes;

(H) carburetor smoking pipes;

(I) electric smoking pipes;

(J) air-driven smoking pipes;

(K) chillums;

(L) bongs;

(M) ice pipes or chillers;

(N) any smoking pipe manufactured to disguise its intended purpose;

(O) wired cigarette papers; or

(P) cocaine freebase kits.

"Drug paraphernalia" shall not include any products, chemicals or materials described in subsection (a) of K.S.A. 2013 Supp. 21-5709, and amendments thereto.

* * * * *

8. Kansas Stat. Ann. § 21-5709 (Supp. 2013) provides in pertinent part:

Unlawful possession of certain drug precursors and drug paraphernalia.

* * * * *

(b) It shall be unlawful for any person to use or possess with intent to use any drug paraphernalia to:

(1) Manufacture, cultivate, plant, propagate, harvest, test, analyze or distribute a controlled substance; or

(2) store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body.

* * * * *

9. Kansas Stat. Ann. § 21-5711 (Supp. 2013) provides:

Factors to consider when determining what is drug paraphernalia. (a) In determining whether an object is drug paraphernalia, a court or other authority shall consider, in addition to all other logically relevant factors, the following:

(1) Statements by an owner or person in control of the object concerning its use;

(2) prior convictions, if any, of an owner or person in control of the object, under any state or federal law relating to any controlled substance;

(3) the proximity of the object, in time and space, to a direct violation of K.S.A. 2013 Supp. 21-5701 through 21-5717, and amendments thereto;

(4) the proximity of the object to controlled substances;

(5) the existence of any residue of controlled substances on the object;

(6) direct or circumstantial evidence of the intent of an owner or person in control of the object, to deliver it to a person the owner or person in control of the object knows, or should reasonably know, intends to use the object to facilitate a violation of K.S.A. 2013 Supp. 21-5701 through 21-5717, and amendments thereto. The innocence of an owner or person in control of the object as to a direct violation of K.S.A. 2013 Supp. 21-5701 through 21-5717, and amendments thereto, shall not prevent a finding that the object is intended for use as drug paraphernalia;

(7) oral or written instructions provided with the object concerning its use;

(8) descriptive materials accompanying the object which explain or depict its use;

(9) national and local advertising concerning the object's use;

(10) the manner in which the object is displayed for sale;

(11) whether the owner or person in control of the object is a legitimate supplier of similar or related items to the community, such as a distributor or dealer of tobacco products;

(12) direct or circumstantial evidence of the ratio of sales of the object or objects to the total sales of the business enterprise;

(13) the existence and scope of legitimate uses for the object in the community;

(14) expert testimony concerning the object's use;

(15) any evidence that alleged paraphernalia can or has been used to store a controlled substance or to introduce a controlled substance into the human body as opposed to any legitimate use for the alleged paraphernalia; or

(16) advertising of the item in magazines or other means which specifically glorify, encourage or espouse the illegal use, manufacture, distribution or cultivation of controlled substances.

(b) The fact that an item has not yet been used or did not contain a controlled substance at the time of the seizure is not a defense to a charge that the item was possessed with the intention for use as drug paraphernalia.

10. Kansas Stat. Ann. § 65-4102 (Supp. 2013) provides in pertinent part:

Board of pharmacy to administer act; authority to control; report to speaker of house and president of senate on substances proposed for scheduling, rescheduling or deletion; scheduling of the controlled substance analog.

* * * * *

(b) Annually, the board shall submit to the speaker of the house of representatives and the president of the senate a report on substances proposed by the board for scheduling, rescheduling or deletion by the legislature with respect to any one of the schedules as set forth in this act, and reasons for the proposal shall be submitted by the board therewith. In making a determination regarding the proposal to schedule, reschedule or delete a substance, the board shall consider the following:

(1) The actual or relative potential for abuse;

(2) the scientific evidence of its pharmacological effect, if known;

(3) the state of current scientific knowledge regarding the substance;

(4) the history and current pattern of abuse;

(5) the scope, duration and significance of abuse;

(6) the risk to the public health;

(7) the potential of the substance to produce psychological or physiological dependence liability; and

(8) whether the substance is an immediate precursor of a substance already controlled under this article.

* * * * *

REPLY BRIEF

RECORD
AND
BRIEFS

No. 13-1034

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FILED
DEC 22 2014
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In the Supreme Court of the United States

MOONES MELLOULI,
Petitioner,

v.

ERIC H. HOLDER, JR., Attorney General,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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TABLE OF CONTENTS

I. A State or foreign conviction is a removable offense under 8 U.S.C. § 1227(a)(2)(B)(i) only if, under the categorical or modified categorical approach, it establishes a connection to a "controlled substance (as defined in section 802 of Title 21)." 1

A. The text, context, and interpretive history of section 1227(a)(2)(B)(i) require a State or foreign conviction to categorically establish a connection to a substance defined in section 802 of Title 21. 3

B. The Government's approach is inconsistent with the text, context, interpretive history, and purpose of section 1227(a)(2)(B)(i). 8

C. The Government cannot justify expanding section 1227(a)(2)(B)(i) beyond its textual limits by making policy arguments about underinclusiveness. 16

II. The Government cannot justify its interpretation of section 1227(a)(2)(B)(i) by invoking *Chevron* deference. 19

CONCLUSION 24

APPENDIX

Appendix 1	Table 1.A	. App. 1
	Table 1.B	App. 13
	Table 1.C	App. 14
	Table 2.A	App. 16
	Table 2.B	App. 27
	Table 2.C	App. 28
	Table 3.A	App. 30
	Table 3.B	App. 40
	Table 3.C	App. 41

TABLE OF AUTHORITIES

CASES

Abramski v. United States,
134 S. Ct. 2259 (2014) 19

Abreu-Semino, Matter of
12 I. & N. Dec. 775 (B.I.A. 1968) 7

B-----, Matter of
5 I. & N. Dec. 479 (B.I.A. 1953) 4

Bowen v. Georgetown Univ. Hosp.,
488 U.S. 204 (1988) 20

Brown v. Gardner,
513 U.S. 115 (1994) 20

Carrillo, Matter of
16 I. & N. Dec. 625 (B.I.A. 1978) 6

Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.,
467 U.S. 837 (1984) 2, 19, 20, 21, 23

D----- S-----, Matter of
3 I. & N. Dec. 502 (B.I.A. 1949) 4

De Jesus Rodriguez, Matter of
A045 450 927, 2009 WL 2437164
(B.I.A. July 30, 2009) 16

Desai v. Mukasey,
520 F.3d 762 (7th Cir. 2008) 10

Descamps v. United States,
133 S. Ct. 2276 (2013) 15, 17

Ex parte Bollman,
8 U.S. (4 Cranch) 75 (1807) 9

FDA. v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 21

Ferreira, Matter of
26 I. & N. Dec. 415 (B.I.A. 2014) 22

Fong, Matter of
10 I. & N. Dec. 616 (B.I.A. 1964) 16

Forest Grove Sch. Dist. v. T.A.,
557 U.S. 230 (2009) 4, 5, 8

Gonzalez-Chavez, Matter of
A017 958 525, 2006 WL 901378
(B.I.A. Feb. 23, 2006) 16

Gousse v. Ashcroft,
339 F.3d 91 (2d Cir. 2003) 8

Hernandez-Ponce, Matter of
19 I. & N. Dec. 613 (B.I.A. 1988) 7, 8, 21

I.N.S. v. St. Cyr,
533 U.S. 289 (2001) 20

Israel Torres Sotelo, Matter of
A091 111 211, 2007 WL 2074451
(B.I.A. June 18, 2007) 21, 22

Jama v. Immigration & Customs Enforcement,
543 U.S. 335 (2005) 9

James v. United States,
550 U.S. 192 (2007) 14, 15

Judulang v. Holder,
132 S. Ct. 476 (2011) 22, 23

Lorillard v. Pons,
434 U.S. 575 (1978) 5

M-----, Matter of
9 I. & N. Dec. 181 (B.I.A. 1961) 7

Maracich v. Spears,
133 S. Ct. 2191 (2013) 10

Martinez Espinoza, Matter of
25 I. & N. Dec. 118 (B.I.A. 2009) 21, 22, 23

Martinez-Gomez, Matter of
14 I. & N. Dec. 104 (B.I.A. 1972) 6, 22

McClendon, Matter of
12 I. & N. Dec. 233 (B.I.A. 1967) 7

Mena, Matter of
17 I. & N. Dec. 38 (B.I.A. 1979) 7, 21

Mendoza-Rivera v. Del Guercio,
161 F. Supp. 473 (S.D. Cal. 1958) 7, 11

Moncrieffe v. Holder,
133 S. Ct. 1678 (2013) 3, 18

N-----, Matter of
6 I. & N. Dec. 557 (B.I.A., A.G. 1955) 6

Nobelman v. Am. Sav. Bank,
508 U.S. 324 (1993) 12, 14

Paulus, Matter of
11 I. & N. Dec. 274
(B.I.A. 1965) 6, 7, 8, 21, 22, 23

Ragasa v. Holder,
752 F.3d 1173 (9th Cir. 2014) 8

Rojas v. Att'y Gen.,
728 F.3d 203 (3d Cir. 2013) 3, 4, 9, 10, 14, 23

Ruiz-Vidal v. Gonzalez,
473 F.3d 1072 (9th Cir. 2007) 8

Schunck, Matter of
14 I. & N. Dec. 101 (B.I.A. 1972) 7

Shepard v. United States,
544 U.S. 13 (2005) 14, 15

State v. Srack,
314 P.3d 890 (Kan. Ct. App. 2013) 15

Sum, Matter of
10 I. & N. Dec. 616 (B.I.A. 1970) 16

T-----C-----, Matter of
7 I. & N. Dec. 100 (B.I.A. 1956) 6, 22

United States ex rel. Mylius v. Uhl,
210 F. 860 (2d Cir. 1914) 4

United States v. Osborne,
551 F.3d 718 (7th Cir. 2009) 10

Urena-Ramirez v. Ashcroft,
341 F.3d 51 (1st Cir. 2003) 7

STATUTES

8 U.S.C. § 1101(a)(43) 19

8 U.S.C. § 1101(a)(48) 19

8 U.S.C. § 1182(a)(2)(A)(i)(II) 12

8 U.S.C. § 1182(h)	12
8 U.S.C. § 1227(a)(2)(A)(iii)	18
8 U.S.C. § 1227(a)(2)(B)(i)	*passim*
8 U.S.C. § 1227(a)(2)(A)(i)(II)	18
8 U.S.C. § 1229b(a)	12
8 U.S.C. § 1229b(b)(1)(C)	12
8 U.S.C. § 1326(b)	19
18 U.S.C. § 2252	10
21 U.S.C. § 811	13
21 U.S.C. § 811(d)(4)(A)	18
Pub. L. 67-227, 42 Stat. 596 (1922)	5
Pub. L. 82-414, 66 Stat. 163 (1952)	5
Pub. L. 84-728, 70 Stat. 567 (1956)	6
Pub. L. 86-648, 74 Stat. 504 (1960)	6
Pub. L. 99-570, 100 Stat. 3207 (1986)	6
Pub. L. 101-649, 104 Stat. 4978 (1990)	8
Pub. L. 104-208, 110 Stat. 3009 (1996)	8
Kan. Stat. Ann. § 21-5701(f)	11
Kan. Stat. Ann. § 21-5709	11
Mass. Gen. Laws ch. 94C, § 31	13

OTHER AUTHORITIES

Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Criminal Law*, 86 N.Y.U. L. Rev. 1669 (2011) 3, 4

The Hashemite Kingdom of Jordan, Law No. 11 of 1988 on Narcotic Drugs & Psychotropic Substances, Art. 6 13, 14

Tony Rizzo, *KC-area police raid operations trafficking in K2 synthetic marijuana*, Wichita Eagle (Oct. 22, 2013) http://www.kansas.com/news/article1125893.html 11

Suspected K2 Ring Busted In Manhattan, WIBW.com (Aug. 19, 2011) http://www.wibw.com/home/headlines/Suspected_K2_Ring_Busted_In_Manhattan_128043008.html 11

I. A State or foreign conviction is a removable offense under 8 U.S.C. § 1227(a)(2)(B)(i) only if, under the categorical or modified categorical approach, it establishes a connection to a "controlled substance (as defined in section 802 of Title 21)."

Petitioner Moones Mellouli is not removable because his conviction for violating the Kansas drug paraphernalia law does not establish a connection to a "controlled substance (as defined in section 802 of Title 21)" under either the categorical or the modified categorical approach—a connection the text, context, history, and purpose of 8 U.S.C. § 1227(a)(2)(B)(i) require.

Since Congress first attached immigration consequences to drug convictions, the text and structure of the governing federal statute have always required a State conviction to establish *both* a specified conduct (e.g., possessing or trafficking) *and* a specified substance to trigger deportation. Courts and the Board of Immigration Appeals consistently interpreted the law in this manner for nearly a century. Congress amended the statute several times against this interpretive backdrop, expanding both the covered conduct and the covered substances, but always preserving both elements and always retaining the phrase "convicted of" that triggers the categorical approach, making this longstanding interpretation binding as a matter of unambiguous legislative intent.

The Government does not dispute that the categorical approach must be used to assess whether a State conviction meets section 1227(a)(2)(B)(i)'s requirements. But it rejects the categorical approach's

focus on the minimum conduct necessary for a State-law conviction, substituting a new framework under which a State law is a categorical match as long as *some* substance the State law covers matches the section-802 definition. The result is the extreme position that all convictions under all Kansas drug laws are deportable offenses, even if the conviction concededly involves only a substance that is not defined in section 802, such as salvia or jimson weed. Resp't Br. 22. The Government's position violates fundamental precepts of interpretation by denying any practical meaning to the limitation expressed by the statutory phrase "controlled substance (as defined in section 802 of Title 21)." And contrary to the presumption that the nation speaks with one voice on matters of immigration policy, the Government's position gives States the power to list any substance they choose and have the resulting conviction support removal.

Finally, the Government cannot justify its novel approach by invoking *Chevron* deference. The Government's interpretation does not qualify for deference because it is neither the one the BIA maintained throughout most of the statute's history nor even the one the BIA maintains now. It is a new position created solely for litigation. There is also no room for *Chevron* deference because there is no ambiguity in what section 1227(a)(2)(B)(i) requires. Under either the categorical or modified categorical approach, a conviction is required to establish a connection to a "controlled substance (as defined in section 802 of Title 21)."

A. The text, context, and interpretive history of section 1227(a)(2)(B)(i) require a State or foreign conviction to categorically establish a connection to a substance defined in section 802 of Title 21.

Since Congress first attached immigration consequences to drug convictions, the governing federal statute has always required *both* a specified offense *and* a specified substance to trigger deportation. Since courts and agencies first interpreted the statute, they have not only recognized the existence of both elements, they have also applied the categorical approach to assess whether the elements have been satisfied, allowing deportation "only if a conviction of [a] state offense necessarily involved ... facts" meeting both elements because "the minimum conduct criminalized" by a State law would do so. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013) (quotation marks and brackets omitted); *see also* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Criminal Law*, 86 N.Y.U. L. Rev. 1669, 1690-91, 1720 (2011) (tracing categorical approach back to 1913). Congress adopted this settled historical interpretation, making it binding as a matter of legislative intent, by repeatedly reenacting the statute against this interpretive backdrop without changing either the statutory structure requiring both conduct and substance or the phrase "convicted of" that triggers the categorical approach. Section 1227(a)(2)(B)(i) thus "requires the Department to establish that a foreign national's conviction is both (1) under a law relating to a controlled substance, and (2) involved or implicated a drug defined in section 802 of Title 21," *Rojas v. Att'y*

Gen., 728 F.3d 203, 214 (3d Cir. 2013) (en banc)—and it requires the Government to establish those two elements categorically.

The Government does not dispute that the categorical approach must be used to assess whether a State conviction meets the requirements of section 1227(a)(2)(B)(i). *See* Resp't Br. 38.[1] It could take no other position given the provision's text and interpretive history. When Congress first tied deportability to a *conviction* for a drug offense in 1922, it did so against the backdrop of the already-established categorical approach. *See United States ex rel. Mylius v. Uhl*, 210 F. 860 (2d Cir. 1914); Das, 86 N.Y.U. L. Rev. at 1689-95. Since what is now section 1227(a)(2)(B)(i) was enacted, the BIA has consistently used the categorical approach to apply it, considering the minimum conduct established by the conviction to determine removability. *Matter of D----- S-----*, 3 I. & N. Dec. 502 (B.I.A. 1949); *Matter of B-----*, 5 I. & N. Dec. 479 (B.I.A. 1953); *Amicus* Br. Immigration Law Professors 13-18. And during the many times Congress amended the deportability ground over the course of ninety years, it was presumptively "aware of [the] administrative [and] judicial interpretation" of section 1227(a)(2)(B)(i) and its predecessors. *Forest*

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[1] Because the Government does not dispute the application of the categorical approach, its reference to allegations in a document outside the record of Mellouli's conviction is irrelevant to the legal analysis under either party's theory. *See* Resp't Br. 12; Joint App. 17-18. The Government recounts allegations tied to a charge Kansas withdrew and that Mellouli therefore had neither the reason nor the opportunity to challenge. None of this information may be considered to establish the elements of Mellouli's conviction, even under the modified categorical approach.

Grove Sch. Dist. v. T.A., 557 U.S. 230, 239-40 (2009) (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)). By retaining the requirement that a noncitizen be "convicted of" a drug offense each time it amended the section, Congress "adopt[ed] that interpretation." *Id.*

The Government challenges the requirement that a conviction categorically establish *both* an offense *and* a substance specified by section 1227(a)(2)(B)(i)—but that requirement is no less a settled part of the text, context, and historical interpretation that Congress adopted than is the categorical approach itself. *See* Pet. Br. 14, 16-17, 34-35. From its inception, the statute has identified covered offenses and covered substances. In its original form, the statute listed them, making deportable any noncitizen convicted of "import[ing] ... any narcotic drug ... or receiv[ing], conceal[ing], buy[ing], or sell[ing] or in any manner facilitat[ing] the transportation, concealment, or sale of any such narcotic drug," defined as "opium, coca leaves, cocaine, or any salt, derivative, or preparation of opium or coca leaves, or cocaine." Pub. L. 67-227, 42 Stat. 596, 596-97, ch. 202 (1922). Over time, Congress amended the statute to add categories of conduct, but it always preserved the original structure requiring both specified conduct and a specified substance. The "relating to" phrase on which the Government relies so heavily was introduced in 1952, not to eliminate the requirement of a specified substance, but to define the categories of covered conduct. *See* Pub. L. 82-414, 66 Stat. 163, § 241(a)(11) (1952) (making deportable any alien who "has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs"). That same "relating to" phrase has been retained in all subsequent amendments, defining an

increasingly broad category of conduct that triggers deportability, but always serving only the limited function of defining the range of activity. Pub. L. 84-728, 70 Stat. 567, § 301 (1956); Pub. L. 86-648, 74 Stat. 504, § 9 (1960). The 1986 statutory amendment, which put section 1227(a)(2)(B)(i) into substantially its current form, *see* Pub. L. 99-570, 100 Stat. 3207, § 1751 (1986), did not depart from this historical structure. The amendment broadened the covered activities to include conduct relating to a federally controlled substance, but it did not abrogate the requirement that a conviction also be connected to a substance within that definition. No amendment at any point in the statute's history has expressed legislative intent to abrogate the dual requirements that a conviction establish both a specified offense and a specified substance.

Even as the BIA has recognized the progressively broader definitions of the types of conduct the statute covered and the progressively longer list of substances, it has always required the conviction to match both. In doing so, it has applied the phrase "relating to" broadly to encompass conduct beyond that specifically named in the statute, while requiring the substance to match exactly.[2] In *Paulus*, for example, California's

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[2] Requiring conduct to match: *E.g.*, *Matter of N-----*, 6 I. & N. Dec. 557, 651 (B.I.A., A.G. 1955) (conspiracy to traffic drugs relates to illicit trafficking); *Matter of T-----C-----*, 7 I. & N. Dec. 100 (B.I.A. 1956) (agreeing to sell a narcotic drug and substituting a non-narcotic substance relates to the illicit trafficking in narcotic drugs); *Matter of Martinez-Gomez*, 14 I. & N. Dec. 104, 105 (B.I.A. 1972) (maintaining a place for the purpose of distributing a narcotic drug relates to illicit trafficking in narcotic drugs); *Matter of Carrillo*, 16 I. & N. Dec. 625 (B.I.A. 1978) (possessing a firearm

divergence from the federal definition of narcotic drug by a single drug meant that although the law related to traffic in narcotic drugs, the "*conviction* [was not] within the immigration laws." 11 I. & N. Dec. 274, 275 (B.I.A. 1965) (emphasis added). In *Matter of Hernandez-Ponce*, 19 I. & N. Dec. 613, 615-16 (B.I.A. 1988), the BIA held that the "significantly broadened ... language" in the amended statute could include a California conviction for "being under the influence of" a California controlled substance, abrogating a prior decision based on more restrictive text. But, while the BIA agreed that the amended statute "clearly contained no limitation" on the "criminal activities" encompassed, it nonetheless required the substance involved to match the federal definition, explaining that the conviction established the substance was "listed as a controlled substance under the Controlled Substances Act." *Id.* at 616. Federal courts have adopted the same interpretation. *See, e.g.*, *Mendoza-Rivera v. Del Guercio*, 161 F. Supp. 473 (S.D. Cal. 1958)

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the commission of a felony does not relate to illicit possession of narcotic drugs), *declined to follow on other grounds in Urena-Ramirez v. Ashcroft*, 341 F.3d 51, 55 (1st Cir. 2003); *Matter of Schunck*, 14 I. & N. Dec. 101, 102-03 & n.1 (B.I.A. 1972) (visiting or being in a room where narcotics are unlawfully used does not relate to illicit possession of or trafficking in a narcotic drug).

Requiring substance to match: *E.g.*, *Matter of M-----*, 9 I. & N. Dec. 181 (B.I.A. 1961) (concluding "opium poppy" met narcotic drug definition); *Matter of McClendon*, 12 I. & N. Dec. 233 (B.I.A. 1967) (confirming demerol as narcotic drug); *Matter of Abreu-Semino*, 12 I. & N. Dec. 775 (B.I.A. 1968) (finding that LSD does not correspond to federal definition of "narcotic drugs"); *Matter of Mena*, 17 I. & N. Dec. 38 (B.I.A. 1979) (confirming heroin as narcotic drug).

(reversing removal order because marijuana was not included in the federal definition of narcotic drug); *Ruiz-Vidal v. Gonzalez*, 473 F.3d 1072 (9th Cir. 2007), *abrogated on other grounds as recognized in Ragasa v. Holder*, 752 F.3d 1173 (9th Cir. 2014); *Gousse v. Ashcroft*, 339 F.3d 91, 96 (2d Cir. 2003).

Congress amended the statute several times after *Paulus* and *Hernandez*, giving it multiple opportunities to reject the administrative interpretation. Pub. L. 101-649, 104 Stat. 4978 (1990); Pub. L. 104-208, 110 Stat. 3009 (1996). But it never did so. Congress never made any textual change to alter the structure requiring a State conviction to categorically establish both a specified offense and a federally specified substance. By retaining that structure, Congress "adopt[ed] that interpretation." *Forest Grove*, 557 U.S. at 239-40.

B. The Government's approach is inconsistent with the text, context, interpretive history, and purpose of section 1227(a)(2)(B)(i).

The Government's approach is inconsistent with the statutory text, context, interpretive history, and purpose. Under its interpretation, noncitizens would become removable for offenses involving any substance any State chooses to control, subject only—and even this limitation is not clear in the Government's position—to the State choosing also to control at least some substance that the United States also chooses to control. This extreme position abrogates the statutory structure requiring a State conviction to establish *both* a specified offense *and* a federally specified substance. It abandons the BIA's long-held interpretation. In its application to State drug paraphernalia laws, it turns the categorical approach on its head by declaring a

State law to be a categorical match as long as *some* substance the State law covers matches the federal definition in section 802. And it guts the statute's restriction to controlled substances "as defined in section 802 of Title 21."

Contrary to the Government's argument, the last-antecedent canon provides no textual basis for its approach. *See* Resp't Br. 25. As a syntactic canon, the presumption that a limiting clause or phrase modifies only the noun or phrase it immediately follows creates only an "inference" about statutory meaning. *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 343-44 (2005). That inference is often overcome by other indications of meaning because "the true sense of the [statutory] words is to be determined by the nature of the provision, and by the context." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807). Here, "[p]arsing the different clauses with the aid of the 'last antecedent' canon reveals that, as a whole, § 1227(a)(2)(B)(i) requires the Department to establish that the individual ... violate[d] a law relating to a controlled substance and ... that the controlled substance is defined as such by federal law." *Rojas*, 728 F.3d at 209.

The Government's proposed interpretation uses the phrase "relating to," not to implement the evident meaning of section 1227(a)(2)(B)(i), but to eliminate it, effectively reading the phrase "a controlled substance (as defined in section 802 of Title 21)" out of the statute. Indeterminate words like "connecting" or "relating" cannot be applied to erase limits set by other, more concrete aspects of statutory text. Here, "relating to" "bridges the state law crimes with federal definitions of what counts as a controlled substance."

Desai v. Mukasey, 520 F.3d 762, 766 (7th Cir. 2008). As this Court recently explained, "connections, like relations, stop nowhere. So the phrase 'in connection with' provides little guidance without a limiting principle consistent with the structure of the statute and its other provisions." *Maracich v. Spears*, 133 S. Ct. 2191, 2200 (2013) (internal quotations omitted). The Seventh Circuit has refused to interpret the phrase "relating to" in 18 U.S.C. § 2252 in the way the Government proposed because doing so would have read the limiting word "abusive" out of the statute. *See, e.g.*, *United States v. Osborne*, 551 F.3d 718, 719 (7th Cir. 2009) (Easterbrook, J.). This Court should equally rebuff the Government's interpretation of "relating to," which reads out of the statute the restriction that only specifically identified, federally controlled substances warrant removability. *Rojas*, 728 F.3d at 209 (applying "the cardinal principle that we do not cripple statutes by rendering words therein superfluous").

The Government offers three arguments to minimize the extent to which its interpretation would abrogate the express textual limitation of section 1227(a)(2)(B)(i) to federally listed substances, but none has merit. First, it argues that States currently list only a small number of non-federally controlled substances, and thus only a small number of convictions can be expected to result from those substances. Resp't Br. 24-25. But even one additional substance extends beyond the textual limits of section 1227(a)(2)(B)(i). The Government's argument is also factually inaccurate. Kansas press accounts show concerted efforts to prosecute offenses involving

synthetic marijuana,[3] illustrating how even one substance not on the federal list can account for many State convictions, just as California's inclusion of marijuana did before Congress added marijuana to the trafficking provision. *Mendoza-Rivera*, 161 F. Supp. 473.

Second, the Government argues that drug paraphernalia crimes "are not limited to any particular substance," and they therefore categorically satisfy section 1227(a)(2)(B)(i)'s limitation to federally controlled substances. Resp't Br. 40. This argument, like the Government's other arguments, would abrogate the statutory structure requiring both a specified offense and a federally specified substance. In addition, the argument thwarts the categorical approach by declaring all convictions to categorically match the removal ground as long as the paraphernalia law covers some substance in section 802—simply because a conviction could hypothetically involve a federal controlled substance. Moreover, the argument ignores the fact that an item (such as a sock) becomes drug paraphernalia only because of its connection to "a controlled substance" on the Kansas schedule. Kan. Stat. Ann. §§ 21-5701(f), 21-5709. To argue that a paraphernalia offense makes a noncitizen deportable regardless of whether it is connected to "a controlled substance (as defined in section 802 of Title 21)" is to

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[3] *See* Tony Rizzo, *KC-area police raid operations trafficking in K2 synthetic marijuana*, Wichita Eagle (Oct. 22, 2013) http://www.kansas.com/news/article1125893.html; *Suspected K2 Ring Busted In Manhattan*, WIBW.com (Aug. 19, 2011) http://www.wibw.com/home/headlines/Suspected_K2_Ring_Busted_In_Manhattan_128043008.html.

ignore the nature of the offense itself. A sock used to conceal a non-section-802 substance like salvia is paraphernalia under Kansas law and its possession is a crime, but to trigger deportability the facts necessarily established must implicate a federally controlled substance.

Third, the Government implies that some who are deportable under its standard could obtain cancellation of removal or return to the U.S. after deportation. Resp't Br. 11. But for many—including Mellouli, who can never legally return to the U.S. if he fails in this appeal—deportation is permanent. 8 U.S.C. §§ 1182(a)(2)(A)(i)(II), 1182(h) (limiting waiver of inadmissibility to single marijuana offense). And their removals based on misdemeanor paraphernalia possession convictions are not subject to cancellation unless they have lived in the U.S. for seven years before committing their offenses. 8 U.S.C. § 1229b(a). Nor can noncitizens obtain cancellation of removal even for extreme and unusual hardship to a citizen spouse or child. 8 U.S.C. § 1229b(b)(1)(C). *See generally Amicus* Br. Nat'l Immigrant Justice Ctr. 12-13 (describing impact on relief for battered women and children and additional consequences).

The last-antecedent canon also cannot be applied as the Government argues because "we cannot discern how [the statute] could be administered under [the proposed] interpretation." *Nobelman v. Am. Sav. Bank*, 508 U.S. 324, 331 (1993) (rejecting application of the rule for this reason and adopting "the more reasonable" interpretation). The Government's brief says nothing at all about how to treat convictions under any foreign drug laws or under the laws of the fifteen States that

have not adopted the Uniform Controlled Substances Act ("UCSA"). Resp't Br. 3-4, 24-25. The Government's position would leave immigration officers and lower courts without guidance on how to address convictions under those jurisdictions' laws. Even as to States that have adopted the UCSA, the Government provides no practical advice on how to determine whether a State drug law categorically falls within section 1227(a)(2)(B)(i). How many substances that are controlled substances "as defined in section 802 of Title 21" must a State's schedule include for it to be "related to" federally controlled substances under section 1227(a)(2)(B)(i)? How many substances that are *not* controlled substances "as defined in section 802 of Title 21" may a State's schedule contain before it is no longer "related to" the federally controlled substances? Is it just a matter of reading the list of substances on the State's schedule, or must immigration officials and courts consider how frequently the substances are a matter of prosecutions, of convictions, or some other metric? (The Government suggests the latter in a footnote, Resp't Br. 39 n.6, emphasizing the indeterminacy of its approach.) All of these questions are presented by existing UCSA States' schedules, which are neither identical to the federal schedule nor identical to one another. States can add substances to their schedules, and most of them have done so. *See e.g.*, Pet. Br. 3 (listing substances Kansas added). The federal schedule, also changes. *See* 21 U.S.C. § 811.

The "interlocking trellis" the Government describes is now overgrown with substances beyond those on the federal list, including prescription medications and poppy seeds. *See, e.g.*, Mass. Gen. Laws ch. 94C, § 31 (Class E includes all prescription drugs); The

Hashemite Kingdom of Jordan, Law No. 11 of 1988 on Narcotic Drugs & Psychotropic Substances, Art. 6 & Sched. I. (defining narcotic drugs included on its schedule of illegal substances to include poppy seeds). How immigration officials addressing paper applications and immigration judges addressing claims made by pro se noncitizens are supposed to administer the Government's approach is something it does not even attempt to explain. *See Rojas*, 728 F.3d at 212 (stating that Government's position "would require immigration agencies and federal courts to become lab experts"). It is impossible to "discern how [section 1227(a)(2)(B)(i)] could be administered" if the Government's position became law. *See Nobelman*, 508 U.S. at 331.

In contrast, under the categorical approach that Mellouli advances, the administration of section 1227(a)(2)(B)(i) is simple and clear. For States with definitions in their drug laws that contain only federally controlled substances, all convictions will categorically meet section 1227(a)(2)(B)(i) and support removal. For States with schedules that contain additional substances beyond those controlled federally, such as Kansas, convictions will support removal if the statute is divisible, the modified categorical approach therefore applies, and the record of conviction establishes that the noncitizen's violation involved a "controlled substance (as defined in section 802 of Title 21)."[4] *See generally Shepard v. United*

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[4] The Government is incorrect in arguing that it can satisfy the categorical approach by proving the lack of prosecutions for the additional substances listed under Kansas law. *See* Resp't Br. 39 n.6 (citing *James v. United States*, 550 U.S. 192 (2007)). Because

States, 544 U.S. 13, 16-17 (2005) (describing modified categorical approach). And where neither the categorical approach nor the modified categorical approach applies, the requirements of section 1227(a)(2)(B)(i) will not be satisfied and removal will not be allowed. *Descamps v. United States*, 133 S. Ct. 2276, 2293 (2013). Whether the Kansas provision at issue for Mellouli is divisible was not addressed below because the BIA concluded that any paraphernalia conviction categorically matches section 1227(a)(2)(B)(i) regardless of the substance involved, and the Eighth Circuit deferred to that position. The Government takes no position on the statute's divisibility. If the statute were determined to be divisible, Mellouli's

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Kansas law expressly lists nine substances that are not controlled under section 802 courts may not speculate on whether the law is broader than the federal definition—by its explicit text, it is. *See* Pet. Br. 3. The situation is thus unlike *James*, where the Court stated that "the proper inquiry is whether the conduct encompassed by the elements of the [state] offense, in the ordinary case," match the generic federal requirement. 550 U.S. at 208. It requires no "legal imagination" to find that Kansas may charge a noncitizen with a substance that is not listed under section 802 when the Kansas schedule expressly lists nine such substances. Pet. Br. 11, 44-45. Mellouli and his *amicus* have also explained the inevitable arbitrary results if incarcerated, unrepresented noncitizens are required to obtain the information necessary to prove the existence of prosecutions of low-level, plea-bargained misdemeanors. *Id.* at 49-51; *Amicus* Br. Nat'l Immigrant Justice Ctr. 26-34. Despite this difficulty, Mellouli has located two additional Kansas K2 prosecutions. No. 10CR1719 (Shawnee Cnty. Sept. 16, 2010) (alleging in Count 2 trafficking in K2, or JWH-018 (1-pentyl-3-(1-naphthoyl)indole) in a correctional institution); *see also State v. Srack*, 314 P.3d 890, 892 (Kan. Ct. App. 2013) (addressing whether Kansas's scheduling of JWH-018 encompassed JWH-081).

record of conviction documents would not support removal because they do not establish a connection to a section-802 (or any other) substance.

C. The Government cannot justify expanding section 1227(a)(2)(B)(i) beyond its textual limits by making policy arguments about underinclusiveness.

The Government complains that the categorical approach may prevent the Attorney General from deporting individuals with drug convictions, but this contention understates the effectiveness of the categorical approach, ignores the potential for the modified categorical approach to resolve many cases, and fights a rearguard action against the accepted consequences of the categorical approach. *See* Resp't Br. 29-30.

The Government argues that Mellouli's reading would mean that inconsistency between State and federal schedules would prohibit removal for any conviction, but State drug laws themselves support the opposite conclusion. First, where State substance definitions match the federal ones, the Government still may deport under the categorical approach. *See Matter of Fong*, 10 I. & N. Dec. 616, 619 (B.I.A. 1964) (allowing deportation because all substances included in State law were included in federal definition of narcotic drug), *overruled in part on other grounds by Matter of Sum*, 10 I. & N. Dec. 616 (B.I.A. 1970); *Matter of De Jesus Rodriguez*, A045 450 927, 2009 WL 2437164, at *2 (B.I.A. July 30, 2009) (concluding that crime of conviction included only federally controlled substances); *Matter of Gonzalez-Chavez*, A017 958 525, 2006 WL 901378, at *2 (B.I.A. Feb. 23, 2006)

(concluding that California narcotic drug definition matched federal controlled substance definition).

Second, when State drug laws require identifying a specific substance for conviction, the modified categorical approach is likely to apply, and the noncitizen will be deportable when that approach identifies a section-802 substance as the basis for conviction. Mellouli has analyzed federal drug statutes and those of the fifty States and the District of Columbia, as well as model jury instructions that clarify a crime's elements and thus the statute's divisibility. *Descamps*, 133 S. Ct. at 2285 n.2 (listing jury instructions among other record-of-conviction documents that indicate the elements that must be proven for conviction). This analysis, displayed in Tables A through C in the Appendix to this brief, shows that, of the 52 covered jurisdictions (the States, District of Columbia, and United States), the statutes (often construed in light of model jury instructions) call for identification of the substance in forty-three jurisdictions for drug distribution offenses; thirty-seven jurisdictions for drug manufacturing offenses; and forty-three jurisdictions for possession offenses. In each case, just three jurisdictions appear not to require identification of the substance.[5] These statutes would likely be analyzed under the modified categorical approach, and convictions connected to section-802 substances would likely trigger deportability under the correct interpretation of section 1227(a)(2)(B)(i). And of course noncitizens are deportable for drug offenses

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[5] The statutory language and model jury instructions (if instructions exist) do not allow a conclusion regarding the remaining jurisdictions.

under other statutes. *See, e.g.*, 8 U.S.C. §§ 1227(a)(2)(A)(i)(II), 1227(a)(2)(A)(iii).

To the extent paraphernalia offenses require identification of the substance for conviction in fewer jurisdictions than other drug offenses, this difference reflects their status as low-level offenses that are used to quickly resolve minor drug charges with minimal court time. *See Amicus* Br. of Nat'l Ass'n of Crim. Def. Lawyers 10-13, 19-21. Mellouli's offense, for which his sentence was a fine, is not even a crime in nineteen States or under federal law and is punished in thirty-three jurisdictions akin to the marijuana offense Congress explicitly exempted. Pet. Br. 39-41.

The Government suggests that Congress intended to tie deportability to substances only States control because States may act faster to schedule dangerous drugs than the federal government. Resp't Br. 35. But the Attorney General has authority to add substances to the federal schedules on an emergency basis. 21 U.S.C. § 811(d)(4)(A). If the Attorney General believes that deportation consequences should attach for a certain substance—and the substance satisfies the federal criteria for designating a controlled substance—the Attorney General can include it without waiting for States to act.

Third, the fact that the categorical approach may result in omitting some convictions involving deportable conduct is an accepted consequence that is more than offset by the benefits of efficiency, uniformity, and consistency with legislative intent the doctrine delivers. *Moncrieffe*, 133 S. Ct. at 1691-92 & n.10 (applying categorical approach to exclude offenses in thirty-six jurisdictions that encompassed both

distributing large quantities of marijuana and small amounts for no remuneration). The Government's assertion that Mellouli's statutory interpretation may limit the number of deportations is less an indictment of Mellouli's statutory interpretation than it is a protest against the categorical approach itself.

II. The Government cannot justify its interpretation of section 1227(a)(2)(B)(i) by invoking *Chevron* deference.

The Government's alternative argument urging deference to the BIA's interpretation under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), cannot sustain its interpretation. Even if *Chevron* applied to a provision with administrative and criminal implications,[6] deference is improper for three reasons. First, the interpretation to which the Government asks this Court to defer is not an interpretation that the BIA has expressed. The Government conditions its position on States adopting the UCSA, Resp't Br. 3-4, and the Eighth Circuit did the same thing. *Mellouli v. Holder*, 719 F.3d 995, 1000

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[6] The words "conviction" and "relating to" carry sentencing consequences under criminal provisions in the INA. *See* 8 U.S.C. §§ 1326(b) (defining enhanced criminal penalties for reentry after "conviction"), 1101(a)(43) (using "relating to" in multiple definitions of "aggravated felony"), 1101(a)(48) (defining "conviction" throughout the INA). By eliminating the minimum conduct test when evaluating a criminal "conviction," the Government redefines the meaning of "conviction." Pet. Br. 35. And by reading "relating to" to subsume the federal controlled substance definition, it affects the meaning of the same phrase in the "aggravated felony" definitions. Because these terms have criminal implications, *Chevron* is inapposite. *Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014).

(8th Cir. 2013). But the BIA has never adopted that position, and the Government's UCSA requirement has no source in the statutory text or history and is not reasonable. The Government's position is adopted for the purpose of litigation and is thus unworthy of deference. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988).

Second, the Government does not identify any source of ambiguity in the statute that would authorize deference to the agency. When "Congress has directly spoken to the precise question at issue," deference is inappropriate because "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. A court must ascertain whether Congress's intent is clear by "employing traditional tools of statutory construction." *Id.* at 843 n.9. As shown above and at pages 13-18 of Mellouli's initial brief, those tools reveal the unambiguous meaning of section 1227(a)(2)(B)(i). Based on the text, context, history, and purpose of that provision, a State conviction is for a removable offense under section 1227(a)(2)(B)(i) only if it categorically establishes a connection to a "controlled substance (as defined in section 802 of Title 21)." Congress's intent is further reinforced by "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *I.N.S. v. St. Cyr*, 533 U.S. 289, 320 & n.45 (2001) (citation omitted) (applying canon as tool of statutory interpretation). The Government's attempt to find ambiguity in the dictionary definitions of "relating to" is misplaced. Resp't Br. 23-25, 50-51. "Ambiguity is a creature not of definitional possibilities but of statutory context," *Brown v. Gardner*, 513 U.S. 115, 118 (1994), and the

statutory and historical context here admit no meaning other than the one the agency and courts have followed for decades, *see FDA. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 157-58 (2000) (stating that legislation enacted against the background of an agency's clear, unwavering position makes the "inference that Congress intended to ratify the [agency's] prior position ... unmistakable").

The Government's position is not subject to *Chevron* deference because the BIA simultaneously maintains conflicting positions on the meaning of section 1227(a)(2)(b)(i) depending on the nature of the offense. Pet. Br. 35-38; *see Brown & Williamson*, 529 U.S. at 133 (requiring statutes to be interpreted "as a symmetrical and coherent regulatory scheme"). For "possessory offenses" and "distribution offenses," the BIA reads section 1227(a)(2)(B)(i) to require a conviction to establish a connection to a section-802 substance. *Paulus*, 11 I. & N. Dec. at 276. But for purported "drug trade" offenses, it takes the view that *all* such offenses fall within the statute regardless of whether they establish a connection to a section-802 substance. *Martinez Espinoza*, 25 I. & N. Dec. 118, 121 (B.I.A. 2009). Under this twofold position, a noncitizen is not deportable for possessing a non-section-802 substance like salvia, but he is deportable for possessing the sock that contained it. The Government nonetheless requests deference by suggesting there is "uncertainty concerning the precedential effect" of *Paulus*. Resp't Br. 49. But the BIA continues to apply *Paulus* to "possession" and "distribution" offenses. *See Matter of Mena*, 17 I. & N. Dec. 38 (B.I.A. 1979); *Matter of Hernandez-Ponce*, 19 I. & N. Dec. 613 (B.I.A. 1988); *Matter of Israel Torres Sotelo*, A091 111 211, 2007 WL

2074451 (B.I.A. June 18, 2007) (unpublished) (stating that "[t]he language of [the parallel inadmissibility provision] embodies the principle announced in *Matter of Paulus*"); *Matter of Ferreira*, 26 I. & N. Dec. 415 (B.I.A. 2014), *motion for reconsideration filed Oct. 22, 2014*. The Government referred to one unpublished BIA decision to suggest that the BIA may be reconsidering its precedent, but that unpublished decision preceded *Ferreira*, and the same BIA member who wrote the unpublished decision later voted to follow *Paulus* in *Ferreira*. Resp't Br. 49-50.

Third, the BIA's position in *Martinez Espinoza* that "drug trade" convictions support deportability without any connection to a section-802 substance is unreasonable. Congress created no "drug trade" exception in its reference to "controlled substances (as defined in section 802 of Title 21)." Quite the opposite, since 1986 the statute has rendered deportable any noncitizen who has been convicted of a violation of "any law or regulation" that relates to a section-802 substance, describing all qualifying drug offenses as part of a single group. The term "drug trade" appears nowhere in the statute, and the text cannot support one test for possession and distribution offenses and a different test for paraphernalia offenses.[7] *See Judulang*

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[7] Nor do the cases cited in *Martinez Espinoza* support its holding. Resp't Br. 51. The record of conviction in *T----- C-----* established that heroin was the narcotic implicated. *See Torres Sotelo*, 2007 WL 2074451, at *4 n.3. And *Martinez-Gomez* involved a pro se respondent who appeared to claim only that the conduct for which he was convicted did not match the removal ground; the decision said nothing about the substance requirement. 14 I. & N. Dec. 104 (B.I.A. 1972).

v. Holder, 132 S. Ct. 476, 483 n.7 (2011) (equating second step of *Chevron* to the arbitrary and capricious test).

The BIA's two-track treatment of drug offenses is confounding. "[T]here is nothing in *Espinoza*, let alone in § 1227(a)(2)(B)(i), to help us logically determine which offenses are 'possessory' and which are not." *Rojas*, 728 F.3d at 211. *Martinez Espinoza* describes *Paulus* as involving a "possessory," not a "drug trade" offense, yet the crime was agreeing to sell a narcotic drug. And the same case describes *possession* of drug paraphernalia as "conduct associated with the drug trade in general." *Martinez Espinoza*, 25 I. & N. Dec. at 121. Moreover, it is inconsistent on the nature of possessing paraphernalia, calling it drug trade on one hand, while on the other stating that possessing paraphernalia in the form of a marijuana pipe could be associated with simple possession and thus subject to the marijuana waiver. *Id.* at 125-26.

CONCLUSION

This Court should reverse the Eighth Circuit's judgment and remand to vacate the order of removal.

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APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix 1	Table 1.A	. App. 1
	Table 1.B	. App. 13
	Table 1.C	. App. 14
	Table 2.A	. App. 16
	Table 2.B	. App. 27
	Table 2.C	. App. 28
	Table 3.A	. App. 30
	Table 3.B	. App. 40
	Table 3.C	. App. 41

APPENDIX 1

Table 1.A
43 Jurisdictions Provide Statutory Text or Pattern Jury Instructions Prompting Identification of a Particular Controlled Substance for Distribution Offenses

Jurisdiction		Statute(s)	Pattern Jury Instruction(s)
1	Alabama	Ala. Code §§ 13a-12-211, 13a-12-231	Ala. Pattern Jury Instructions: Crim. Instructions 12-1, 12-19, 12-21, 12-23, 12-25, 12-27 (1994)
2	Arkansas	Ark. Code Ann. §§ 5-64-422, 5-64-426, 5-64-430, 5-64-434, 5-64-438, 5-64-440	2-64 Ark. Model Jury Instructions: Crim. Instructions 6406, 64.440 (2d ed.)
3	California	Cal. Health & Safety Code §§ 11352, 11357.5, 11360, 11379	Judicial Council of Calif. Crim. Jury Instructions 2300, 2350 (2014)

4	Connecticut	Conn. Gen. Stat. § 21a-277	Conn. Crim. Jury Instruction 8.1-1 (2008)
5	District of Columbia	D.C. Code § 48-904.01(a)	1-VI Crim. Jury Instructions for D.C. 6.201, 6-202 (2014)
6	Florida	Fla. Stat. § 893.13(1)	Fla. Standard Jury Instructions 25.2, 25.3, 25.9, 25.10 (2013)
7	Georgia	Ga. Code Ann. §§ 16-13-30(b), 16-13-31	Georgia Suggested Pattern Jury Instructions: Crim. Instruction 2.70.10 (2014)
8	Hawaii	Haw. Rev. Stat. §§ 712-1240.7, 712-1240.8, 712-1241, 712-1242, 712-1244, 712-1245, 712-1247, 712-1248, 712-1249.4, 712-1249.5	Haw. Standard Crim. Jury Instructions 13.03, 13.04, 13.05, 13.10, 13.14, 13.15, 13.19, 13.24, 13.25, 13.27, 13.29, 13.33, 13.36, 13.41, 13.51, 13.52, 13.58, 13.59, 13.62 (2012)

9	Idaho	Idaho Code Ann. §§ 37-2732 37-2734, 37-2737A	Idaho Criminal Jury Instructions 403A, 404, 406A, 406B, 406D, 406E (2010)
10	Illinois	720 Ill. Comp. Stat. 550/5, 550/5.1, 570/401, 646/55, 646/56	Ill. Pattern Crim. Jury Instructions 17.06, 17.08, 17.18, 17.46 (2014)
11	Indiana	Ind. Code §§ 35-48-4-1, 35-48-4-1.1, 35-48-4-2, 35-48-4-3, 35-48-4-4, § 35-48-4-4.5, 35-48-4-4.6, 35-48-4-5, 35-48-4-10, 35-48-4-10.5	1-8 Ind. Pattern Jury Instructions: Crim. Instructions 8.01, 8.01.1, 8.03, 8.03a, 8.05, 8.07, 8.09, 8.11, 8.33, 8.33.2, 8.33.3 (2014)
12	Iowa	Iowa Code §§ 124.401, 124.401E	Iowa Crim. Jury Instructions 2300.1, 2300.2 (2009)

13	Kansas (except for simulated controlled substance)	Kan. Stat. Ann. §§ 21-5705, 21-5708, 21-5713(a)	Pattern Instructions Kan.: Crim. Instructions 57.020, 57.030, 57.050, 57.200 (4th ed.)
14	Kentucky	Ky. Rev. Stat. Ann. §§ 218A.140, 218A.1404(1), 218A.1404(3), 218A.1412(1), 218A.1413(1), 218A.1414(1), 218A.1421(1), 218A.1430(1), 218A.1438(1), 218A.1450(1)	Cooper Ky. Instructions to Juries §§ 9.11A, 9.11A.1, 9.11A.2, 9.11A.3, 9.11B, 9.11B.1, 9.11B.2, 9.11F, 9.11G, 9.13A, 9.13A.1, 9.13B, 9.13B.1, 9.13C, 9.15A, 9.15B, 9.15B.1, 9.15C, 9.15C.1, 9.15D, 9.17A, 9.17B, 9.18A, 9.18B, 9.20A, 9.20B, 9.30A, 9.30B (2013)

15	Louisiana	La. Rev. Stat. Ann. §§ 40:962.1.2, 40:966, 40:967(A), 40:968(A), 40:969(A), 40:970(A), 40:971.2, 40:989.1, 40:989.2	17 La. Civ. L. Treatise, Crim. Jury Instructions §§ 13:1, 13:3, 13:21 (3d ed.)
16	Maryland (except for "faked controlled substance")	Md. Code Ann., Crim. Law §§ 5-601, 5-602, 5-604, 5-612, 5-617, 5-902(b), 5-902(c), 5-904	Md. Crim. Pattern Jury Instructions 4:24.1, 4:24.2 (2013)
17	Massachusetts	Mass. Gen. Laws ch. 94C §§ 32-32E, -32G	Mass. Crim. Model Jury Instructions 7.800 (2013)
18	Michigan	Mich. Comp. Laws §§ 333.7401, 333.7401a, 333.7402, 333.7403	Mich. Model Crim. Jury Instructions 12.2, 12.3 (2014)

19	Minnesota	Minn. Stat. §§ 152.021, subd. 1, 152.022, subd. 1, 152.023, subd. 1, 152.024 subd. 1, 152.025, subd. 1, 152.027 subd. 1, 5-6, 152.097	10A Minn. Prac. Jury Instruction Guides: Crim. Instructions 20.01, 20.02, 20.07, 20.08, 20.15, 20.16, 20.23, 20.24, 20.33, 20.34, 20.39, 20.40 (5th ed.)
20	Mississippi	Miss. Code Ann. § 41-29-139	Miss. Model Jury Instructions: Crim. Instructions 4:1-:2, 4:6-:7, 4:9-:10, 4:17-:20 (2013)
21	Missouri	Mo. Rev. Stat §§ 195.211, 195.214, 195.242, 195.222, 195.223	Mo. Approved Instructions: Crim. Instructions 325.04.1-2, 325.08, 325.10.1-2, 325.11.1-2, 325.12, 325.14, 325.15-16, 325.28 (1987)

22	Montana	Mont. Code Ann. §§ 45-9-101, 45-9-103	Mont. Crim. Jury Instructions 9-101, 9-101(a), 9-104, 9-104(a), 9-112 (2009)
23	New Hampshire	N.H. Rev. Stat. Ann. § 318-B:2(I)	N.H. Crim. Jury Instructions 318-B:2, I (2010)
24	New Jersey	N.J. Stat. Ann. §§ 2C:35-3, 2C:35-5	N.J. Model Charges 2C:35-3, 2C:35-5, 2C:35-11 (2014)
25	New Mexico	N.M. Stat. Ann. §§ 30-31-22, 30-31-25.1	N.M. Uniform Jury Instructions: Crim. Instructions 14-3110, 14-3111, 14-3121, 14-3122 (2014)
26	New York	N.Y. Penal Law §§ 220.31, 220.34, 220.39, 220.41, 220.43, 220.77, 221.35, 221.40, 221.45, 221.50, 221.55	N.Y. Crim. Jury Instructions 220.31, 220.34, 220.39, 220.41, 220.43, 220.77, 221.35, 221.40, 221.45, 221.50, 221.55 (2003)

27	North Carolina	N.C. Gen. Stat. § 90-95(a)(1)	N.C. Pattern Jury Instructions: Crim. Instruction 260.21 (2013)
28	North Dakota	N.D. Cent. Code § 19-03.1-23-1	N.D. Pattern Jury Instructions: Crim. Instruction § 22.20 (1994)
29	Ohio	Ohio Rev. Code Ann. § 2925.03	Ohio Jury Instructions: Crim. Instruction 525.03 (2014)
30	Oklahoma	Okla. St. tit. 63 §§ 2-401, 2-415(B)	Vernon's Okla. Uniform Jury Instructions: Crim. Instructions 6-2, 6-4, 6-13 (2d ed.)
31	Oregon (except imitation controlled substance)	Or. Rev. Stat. §§ 475.752(1), 475.752(2), 475.912, 475.962	Or. Uniform Crim. Jury Instructions 2608, 2613 (2013)

32	Pennsylvania (except imitation controlled substance)	35 Pa. Cons. Stat. §§ 780-113(a)(30), 780-113(a)(36), 780-113(a)(35)(ii)	Pa. Suggested Standard Crim. Jury Instructions 16.01, 16.13(a)(30)B (2012)
33	Rhode Island	R.I. Gen. Laws § 21-28-4.01(a), (b)	R.I. Att'y. Gen.'s Pattern Crim. Jury Instructions, VIII. H. (2), (3) (2000)
34	South Carolina	S.C. Code Ann. §§ 44-53-370(a), (e), 44-53-375	S.C. Suggested Jury Instructions: Crim. Instructions pp. 129-42 (2014)
35	South Dakota	S.D. Codified Laws §§ 22-42-2, 22-42-3, 22-42-4, 22-42-7	S.D. Pattern Jury Instructions: Crim. Instructions 3-11-1, 3-11-2, 3-11-3, 3-11-15, 3-11-15.1, 3-11-17, 3-11-18 (2013)

36	Tennessee (except unclear for meth precursors and imitation controlled substances)	Tenn. Code Ann. §§ 39-17-417, 39-17-418(b), 39-17-430(a)-(b), 39-17-431(m)(1)(A), 39-17-433(a)(1), 39-17-438(a)(1), 39-17-452(a), 39-17-453(a), 39-17-454(c), 39-17-455(a)	Tenn. Pattern Jury Instructions: Crim. Instructions 31.01, 31.04 (2014)
37	Texas (except unclear for precursors)	Tex. Health & Safety Code Ann. §§ 481.112, 481.1121, 481.113, 481.114, 481.120, 482.002	Texas Crim. Jury Charges 13:280, 13:290, 13:300, 13:310, 13:320, 13:330, 13:350 (2008)
38	Vermont	Vt. Stat. Ann. tit. 18 §§ 4205, 4228(a), 4230(b), (c), 4231(b), (c), 4232(b), 4233(b), (c), 4234(b), 4234a(b), (c), 4235(b), 4235a(b)	Vt. Crim. Jury Instructions 4-40-051, 4-40-061, 4-40-071, 4-40-151, 4-40-161, 4-40-171, 4-40-251 (2005)

39	Virginia (except imitated controlled substance)	Va. Code Ann. §§ 18.2-248, 18.2-248.03, 18.2-248.1, 18.2-248.5, 18.2-251.2, 18.2-251.3, 18.2-260	1-22 Va. Model Jury Instructions: Crim. Instructions G22.200, G22.230, G22.240, G22.260, G22.265, G22.270, G22.275, G22.300, G22.320, G22.325, G22.360, G22.370, G22.380, G22.400 (2014)
40	Washington	Wash. Rev. Code §§ 69.50.401, 69.50.4011, 69.50.4012, 69.50.402, 69.50.403, 69.50.410, 69.50.416	11 Wash. Prac. Pattern Jury Instructions: Crim. Instructions 50.06, 50.14, 50.16, 50.50 (3d ed.)

41	Wisconsin	Wis. Stat. §§ 961.41(1), 961.41(4)(cm), 961.41(4)(bm), 961.574	Wis. Jury Instructions: Crim. Instructions 6020, 6020A, 6035, 6040, 6042 (2014)
42	Wyoming	Wyo. Stat. Ann. §§ 35-7-1031(a), 35-7-1032(a)(i)-(ii), 35-7-1033(a)(i), 35-7-1041	Wyo. Crim. Pattern Jury Instructions 111.02, 111.03, 111.06A, 111.10 (2009)
43	Federal Controlled Substances Act	21 U.S.C. § 841(a)	2B Fed. Jury Prac. & Instructions §§ 64:01, 64:03, 64:05, 64:07 (6th ed.)

Table 1.B
3 Jurisdictions Provide Statutory Text or Pattern Jury Instructions Not Prompting Identification of a Particular Controlled Substance for Distribution Offenses

Jurisdiction		Statute(s)	Pattern Jury Instruction(s)
1	Alaska	Alaska Stat. §§ 11.71.020, 11.71.030, 11.71.040, 11.71.050	Alaska Crim. Pattern Jury Instructions 11.71.020(a)(1), 11.71.030(a)(1), 11.71.040(a)(1), (a)(2), 11.71.050(a)(1) (2014)
2	Arizona (except where statute specifies marijuana)	Ariz. Rev. Stat. Ann. §§ 13-3402, 13-3404, 13-3404.01, 13-3405, 13-3407, 13-3408, 13-3453	Ariz. Pattern Jury Instructions: Crim. Instructions 34.022, 34.04.01(A), 34.052, 34.0541, 34.072, 34.0771, 34.082, 34.0871, 34.53 (2014)

3	Colorado (except methampheta mine, heroin, ketamine, marijuana, and cathinones)	Colo. Rev. Stat. §§ 18-18-405, 18-18-406(1), 18-18-406(2)(b)(I)	Colo. Jury Instructions: Crim. Instruction 18:05

Table 1.C
6 Jurisdictions Provide Statutory Text or Pattern Jury Instructions that are Unclear on Identification of a Particular Controlled Substance or Lack Jury Instructions for Distribution Offenses

Jurisdiction		**Statute(s)**	**Pattern Jury Instruction(s)**
1	Delaware (except where statute specifies marijuana)	Del. Code Ann. tit. 16 §§ 4752, 4753, 4754, 4755, 4756, 4763, 4764	N/A
2	Maine (except where statute specifies marijuana)	Me. Rev. Stat. tit. 17-A §§ 1103, 1104, 1106, 1108, 1109, 1116, 1117	1-6 Me. Jury Instructions Manual § 6-36 (2014)
3	Nebraska (except where specified by statute)	Neb. Rev. Stat. §§ 28-416(1), 28-416(4)	N/A

4	Nevada (except where statute specifies marijuana)	Nev. Rev. Stat. §§ 453.321, 453.322, 453.3385, 453.339, 453.3393, 453.3395, 453.332(1), 453.332(3), 453.336, 453.337, 453.338, 453.3385, 453.339, 453.3395	N/A
5	Utah	Utah Code Ann. §§ 58-37-8, 58-37b-4, 58-37b-6, 58-37c-3(11)(b), (k), 58-37d-4(1)(a), (f), (h)	N/A
6	West Virginia	W. Va. Code §§ 60A-4-401, 60A-4-413	N/A

Table 2.A
43 Jurisdictions Provide Statutory Text or Pattern Jury Instructions Prompting Identification of a Particular Controlled Substance for Possession Offenses

Jurisdiction		Statute(s)	Pattern Jury Instruction(s)
1	Alabama	Ala. Code §§ 13A-12-212, 13A-12-213, 13A-12-214	Ala. Pattern Jury Instructions: Crim. Instructions 12-4, 12-10, 12-13, 12-16 (1994)
2	Arkansas	Ark. Code Ann. § 5-64-419	2-64 Ark. Model Jury Instruction: Crim. Instruction 6404 (2d ed.)
3	California	Cal. Health & Safety Code §§ 11350, 11357, 11377	Judicial Council of Calif. Crim. Jury Instructions 2304, 2375 (2014)
4	Connecticut	Conn. Gen. Stat. § 21a-279	Conn. Crim. Jury Instruction 8.1-7 (2012)

5	District of Columbia	D.C. Code § 48-904.01(d)	1-VI Crim. Jury Instructions for D.C. 6.200 (2014)
6	Florida	Fla. Stat. § 893.13(6)	Fla. Standard Jury Instruction: Crim. Instruction 25.7 (2013)
7	Georgia	Ga. Code Ann. §§ 16-13-30(a), 16-13-31	Georgia Suggested Pattern Jury Instructions: Crim. Instruction 2.70.10 (2014)
8	Hawaii	Haw. Rev. Stat. §§ 712-1240.7, 712-1241, 712-1242, 712-1243, 712-1244, 712-1245, 712-1246, 712-1246.5, 712-1247, 712-1248, 712-1249, 712-1249.4, 712-1249.5	Haw. Standard Crim. Jury Instructions 13.01, 13.02, 13.07, 13.08, 13.09, 13.11, 13.12, 13.13, 13.17, 13.18, 13.20, 13.21, 13.22, 13.23, 13.26, 13.28, 13.30, 13.31, 13.32, 13.34, 13.35, 13.37, 13.40, 13.42 (2014)

9	Idaho	Idaho Code Ann.§ 37-2732	Idaho Criminal Jury Instructions 402A, 402B, 403, 403A, 406A, 406B, 406D, 406E (2010)
10	Illinois	720 Ill. Comp. Stat. 550/4, 570/402, 646/60	Ill. Pattern Crim. Jury Instructions 17.02, 17.12, 17.28 (2014)
11	Indiana	Ind. Code §§ 35-48-4-4.6, 35-48-4-6, 35-48-4-6.1, 35-48-4-7, 35-48-4-11, 35-48-4-14.5	1-8 Ind. Pattern Jury Instructions: Crim. Instructions 8.15, 8.15.1, 8.17, 8.17a, 8.19, 8.20a, 8.20b, 8.20c, 8.35 (2014)
12	Iowa	Iowa Code § 124.401	Iowa Crim. Jury Instructions 2300.3 (2009)
13	Kansas (except for simulated controlled substance)	Kan. Stat. Ann. §§ 21-5706, 21-5713(b)	Pattern Instructions Kan.: Crim. Instructions 57.040, 57.050 (4th ed.)

14	Kentucky	Ky. Rev. Stat. Ann. §§ 218A.140, 218A.1404(2), 218A.1415(1), 218A.1416(1), 218A.1417(1), 218A.1422(1), 218A.1437(1), 218A.1451(1)	Cooper Ky. Instructions to Juries §§ 9.11B, 9.11B.1, 9.11B.2, 9.12, 9.13A, 9.13B, 9.13B.1, 9.14, 9.15C, 9.15C.1, 9.15D, 9.16, 9.17B, 9.18B, 9.20B, 9.21, 9.30B (2013)
15	Louisiana	La. Rev. Stat. Ann. §§ 40:962.1.1, 40:967(C), 40:968(C), 40:969(C), 40:970(C), 40:989.1, 40:989.2	17 La. Civ. L. Treatise, Crim. Jury Instructions §§ 13:4, 13:6, 13:7, 13:8, 13:9, 13:10, 13:11, 13:12, 13:13, 13:14 (3d ed.)
16	Maryland	Md. Code Ann., Crim. Law §§ 5-601, 5-604, 5-612, 5-617, 5-902(b), 5-902(c)	Md. Crim. Pattern Jury Instructions 4:24, 4:24.13 (2013)
17	Massachusetts	Mass. Gen. Laws ch. 94C §§ 32-32E, 32G, -34	Mass. Crim. Model Jury Instructions 7.800, 7.820 (2013)

18	Michigan	Mich. Comp. Laws §§ 333.7401, 333.7402, 333.7403	Mich. Model Crim. Jury Instructions 12.3, 12.5 (2014)
19	Minnesota	Minn. Stat. §§ 152.021, subd. 2, 152.022, subd. 2, 152.023 subd. 2, 152.024 subd. 2, 152.025 subd. 2(1), 152.027 subd. 2-3, 5-6, 152.0262 subd. 1, 152.136 subd. 2	10A Minn. Prac. Jury Instruction Guides: Crim. Instructions 20.03, 20.04, 20.13, 20.14, 20.19, 20.20, 20.31, 20.32, 20.35, 20.36, 20.41, 20.42, 20.43, 20.44, 20.64, 20.65, 20.66 (5th ed.)
20	Mississippi	Miss. Code Ann. § 41-29-139	Miss. Model Jury Instructions: Crim. Instructions 4:5, 4:8, 4:11-:16 (2013)
21	Missouri	Mo. Rev. Stat. § 195.202	Mo. Approved Instructions: Crim. Instruction 325.02 (1987)

22	Montana (except unclear on misdemeanors)	Mont. Code Ann. § 45-9-102	Mont. Crim. Jury Instructions 9-102, 9-102(a), 9-103, 9-103(a) (2009)
23	New Hampshire	N.H. Rev. Stat. Ann. § 318-B:2(I)	N.H. Crim. Jury Instructions 318-B:2, I (2010)
24	New Jersey	N.J. Stat. Ann. § 2C:35-10	N.J. Model Charges 2C:35-10 (2014)
25	New Mexico	N.M. Stat. Ann. §§ 30-31-23, 30-31-25.1	N.M. Uniform Jury Instructions: Crim. Instructions 14-3101, 14-3102, 14-3122, 14-3130 (2014)
26	New York	N.Y. Penal Law §§ 220.03, 220.06, 220.09, 220.16, 220.18, 220.21, 221.10, 221.15, 221.20, 221.25, 221.30	N.Y. Crim. Jury Instructions 220.03, 220.06, 220.09, 220.16, 220.18, 220.21, 221.10, 221.15, 221.20, 221.25, 221.30 (2003)

27	North Carolina	N.C. Gen. Stat. § 90-95(a)(3)	N.C. Pattern Jury Instructions: Crim. Instructions 260.10, 260.17 (2013)
28	North Dakota	N.D. Cent. Code § 19-03.1-23	N.D. Pattern Jury Instructions: Crim. Instruction § 22.35 (1994)
29	Ohio	Ohio Rev. Code Ann. § 2925.11	Ohio Jury Instructions: Crim. Instruction 525.11 (2014)
30	Oklahoma	Okla. St. tit. 63 § 2-402(A)(1)	Vernon's Okla. Uniform Jury Instructions: Crim. Instructions 6-6, 6-11 (2d ed)
31	Oregon	Or. Rev. Stat. §§ 475.752(3), 475.967	Or. Uniform Crim. Jury Instructions 2609, 2613 (2013)

32	Pennsylvania	35 Pa. Cons. Stat. §§ 780-113 (a)(16), 780-113 (a)(36)	Pa. Suggested Standard Crim. Jury Instructions 16.01 (2012)
33	Rhode Island	R.I. Gen. Laws § 21-28-4.01(c)	R.I. Att'y. Gen.'s Pattern Crim. Jury Instructions, VIII. H. (1) (2000)
34	South Carolina	S.C. Code Ann. § 44-53-370(c), (d)	S.C. Suggested Jury Instructions: Crim. Instructions pp. 133-34, 140-42 (2014)
35	South Dakota	S.D. Codified Laws §§ 22-42-5, 22-42-6, 22-42-22	S.D. Pattern Jury Instructions: Crim. Instructions 3-11-10, 3-11-14.1, 3-11-14.2, 3-11-16, 3-11-16.1, 3-11-16.2 (2013)

36	Tennessee (except unclear for meth precursors and imitation controlled substances)	Tenn. Code Ann. §§ 39-17-418, 39-17-438(a)(1), 39-17-452(a), 39-17-453(c), 39-17-454(d), 53-11-402(a)(3)	Tenn. Pattern Jury Instructions: Crim. Instructions 31.04, 31.05 (2014)
37	Texas (except unclear for precursors and simulated controlled substances)	Tex. Health & Safety Code Ann. §§ 481.115, 481.1151, 481.116, 481.1161, 481.117, 481.118, 481.121, 481.136	Texas Crim. Jury Charges §§ 13:230, 13:240, 13:250, 13:255, 13:260, 13:270, 13:340, 13:380 (2008)

38	Vermont	Vt. Stat. Ann. tit. 18 §§ 4205, 4230(a), 4230d, 4231(a), 4232(a), 4233(a), 4234a(a), 4234a, 4234b(a), 4235(b), 4235a(a)	VT Crim. Jury Instructions §§ 4-40-011, 4-40-021, 4-40-031, 4-40-041, 4-40-111, 4-40-121, 4-40-131, 4-40-141, 4-40-211, 4-40-221, 4-40-231, 4-40-241, 4-40-311, 4-40-321, 4-40-331, 4-40-341, 4-40-411, 4-40-421, 4-40-431, 4-40-441 (2005)
39	Virginia	Va. Code Ann. §§ 18.2-250, 18.2-250.1, 18.2-251.2, 18.2-251.3	1-22 Va. Model Jury Instructions: Crim. Instructions G22.500, 22.520, G22.560 (2014)
40	Washington	Wash. Rev. Code §§ 69.50.401 69.50.4012, 69.50.4013, 69.50.4014, 69.50.416, 69.50.440	11 Wash. Prac. Pattern Jury Instructions: Crim. Instructions 50.02, 50.14, 50.50 (3d ed.)

41	Wisconsin	Wis. Stat. §§ 961.41(3g), 961.41(1m), 961.43(1)(a)	Wis. Jury Instructions: Crim. Instructions 6030, 6031, 6035, 6036, 6038 (2014)
42	Wyoming	Wyo. Stat. Ann. §§ 35-7-1031, 35-7-1033(a)(iii)	Wyo. Crim. Pattern Jury Instructions 111.02, 111.03, 111.04A, 111.04B (2009)
43	Federal Controlled Substances Act	21 U.S.C. § 844(a)	2B Fed. Jury Prac. & Instructions §§ 64:10, 64:12 (6th ed.)

Table 2.B
3 Jurisdictions Provide Statutory Text or Pattern Jury Instructions Not Prompting Identification of a Particular Controlled Substance for Possession Offenses

Jurisdiction		Statute(s)	Pattern Jury Instruction(s)
1	Alaska (except that a conviction involving more than 25 marijuana plants requires that substance is identified)	Alaska Stat. §§ 11.71.040, 11.71.050, 11.71.060	Alaska Crim. Pattern Jury Instructions 11.71.020(a)(1), 11.71.030(a)(1), 11.71.040(a)(1), (a)(2), 11.71.050(a)(1), 11.71.050(a)(2)(A-E), 11.71.060(a)(2) (2014)
2	Arizona (except where statute specifies marijuana)	Ariz. Rev. Stat. Ann. §§ 13-3402, 13-3404.01, 13-3405, 13-3407, 13-3408, 13-3456	Ariz. Pattern Jury Instructions: Crim. Instructions 34.021, 34.04.01(A), 34.051, 34.071, 34.081 (2014)

3	Colorado (except for flunitrazepam, ketamine, marijuana, and cathinones)	Colo. Rev. Stat. §§ 18-18-403.5, 18-18-406(4)-(5)	Colo. Jury Instructions: Crim. Instruction 18:01

Table 2.C

6 Jurisdictions Provide Statutory Text or Pattern Jury Instructions that are Unclear on Identification of a Particular Controlled Substance or Lack Jury Instructions for Possession Offenses

Jurisdiction		Statute(s)	Pattern Jury Instruction(s)
1	Delaware (except where statute specifies marijuana)	Del. Code Ann. tit. 16 §§ 4752, 4753, 4754, 4755, 4756, 4763, 4764	N/A
2	Maine (except where statute specifies marijuana)	Me. Rev. Stat. tit. 17-A §§ 1103, 1104, 1106, 1107, 1108, 1109, 1116, 1117	1-6 Me. Jury Instructions Manual §§ 6-36, 6-43 (2014)
3	Nebraska (except where specified by statute)	Neb. Rev. Stat. §§ 28-416(1), 28-416(4)	Neb. Jury Instructions: Crim. Instruction 4.2 (2010)

4	Nevada (except where statute specifies marijuana)	Nev. Rev. Stat. §§ 453.321, 453.322, 453.3385, 453.339, 453.3393, 453.3395, 453.332(1), 453.332(3), 453.336, 453.337, 453.338, 453.3385, 453.339, 453.3395	N/A
5	Utah	Utah Code Ann. §§ 58-37-8, 58-37b-4, 58-37b-6, 58-37c-3(11)(b), (k), 58-37d-4(1)(a), (f), (h)	N/A
6	West Virginia	W. Va. Code §§ 60A-4-401, 60A-4-413	N/A

Table 3.A
37 Jurisdictions Provide Statutory Text or Pattern Jury Instructions Prompting Identification of a Particular Controlled Substance for Manufacturing Offenses

Jurisdiction		Statute(s)	Pattern Jury Instruction(s)
1	Alabama	Ala. Code §§ 13a-12-217, 13a-12-231	Ala. Pattern Jury Instructions: Crim. Instructions 12-1, 12-19, 12-21, 12-23, 12-25, 12-27 (1994)
2	Arkansas	Ark. Code Ann. §§ 5-64-423, 5-64-427, 5-64-431, 5-64-435, 5-64-439	2-64 Ark. Model Jury Instructions: Crim. 6405 (2d ed.)
3	California	Cal. Health & Safety Code §§ 11358, 11379.6	Judicial Council of Calif. Crim. Jury Instructions 2330, 2370 (2014)
4	Florida	Fla. Stat. § 893.13(1)	Fla. Standard Jury Instruction: Crim. Instruction 25.2 (2013)

5	Georgia	Ga. Code Ann. §§ 16-13-30(b), 16-13-31	Georgia Suggested Pattern Jury Instructions: Crim. Instruction 2.70.10 (2014)
6	Idaho	Idaho Code Ann. §§ 37-2732, 37-2732A, 37-2737A	Idaho Criminal Jury Instructions 403A, 405, 406A, 406B, 406C, 406E (2010)
7	Illinois	720 Ill. Comp. Stat. 550/5, 550/5.1, 550/8, 570/401, 646/15, 646/56	Ill. Pattern Crim. Jury Instructions 17.06, 17.12, 17.18 (2014)
8	Indiana	Ind. Code §§ 35-48-4-4.6, 35-48-4-1.1, 35-48-4-2, 35-48-4-3, 35-48-4-4	1-8 Ind. Pattern Jury Instructions: Crim. Instructions 8.01, 8.01.1, 8.03, 8.03a, 8.05, 8.07, 8.11, 8.33, 8.33.2, 8.33.3 (2014)

9	Iowa	Iowa Code §§ 124.401, 124.401E	Iowa Crim. Jury Instructions 2300.1, 2300.2 (2009)
10	Kansas	Kan. Stat. Ann. §§ 21-5703, 21-5705, 21-5713(a)	Pattern Instructions Kan. Crim.: Instructions 57.010, 57.021, 57.050 (4th ed.)
11	Kentucky	Ky. Rev. Stat. Ann. §§ 218A.140, 218A.1423(1), 218A.1432(1), 218A.1452(1)	Cooper Ky. Instructions to Juries §§ 9.11A, 9.11A.1, 9.11A.2, 9.11A.3, 9.11B, 9.11B.1, 9.11B.2, 9.11C, 9.11D, 9.11E, 9.13A, 9.13A.1, 9.13B, 9.13B.1, 9.15A, 9.15B, 9.15B.1, 9.15C, 9.15C.1, 9.15D, 9.17A, 9.17B, 9.18A, 9.18B, 9.20A, 9.22, 9.23 (2013)

12	Louisiana	La. Rev. Stat. Ann. §§ 40:967(A), 40:968(A), 40:969(A), 40:970(A), 40:989.1, 40:989.2	17 La. Civ. L. Treatise, Crim. Jury Instructions § 13:2, 13:21 (3d ed.)
13	Maryland	Md. Code Ann., Crim. Law §§ 5-602, 5-604, 5-612, 5-617, 5-902(b), 5-902(c)	Md. Crim. Pattern Jury Instructions 4:24.3 (2013)
14	Massachusetts	Mass. Gen. Laws ch. 94C §§ 32-32E, -32G	Mass. Crim. Model Jury Instructions 7.800 (2013)
15	Michigan	Mich. Comp. Laws § 333.7401c	Mich. Model Crim. Jury Instructions 12.1 (2014)

16	Minnesota	Minn. Stat. §§ 152.021 subd. 1, 152.021 subd. 2(a), 152.022 subd. 1, 152.022 subd. 1(6), 152.023 subd. 1, 152.024 subd. 1, subd. 1(2), subd. 1(4), 152.025 subd. 1, 152.027 subd. 1, 5-6, 152.097(1)	10A Minn. Prac. Jury Instruction Guides: Crim. Instructions 20.01, 20.02, 20.05, 20.06, 20.07, 20.08, 20.15, 20.16, 20.23, 20.24, 20.33, 20.34, 20.40, 20.67 (5th ed.)
17	Mississippi	Miss. Code Ann. § 41-29-139	Miss. Model Jury Instructions: Crim. Instructions 4:6-:7, 4:9-:10, 4:17-:18 (2013)
18	Missouri	Mo. Rev. Stat §§ 195.211, 195.242, 195.420	Mo. Approved Instructions: Crim. Instructions 325.06.1, 325.06.02 (1987)

19	Montana	Mont. Code Ann. §§ 45-9-107, 45-9-110	Mont. Crim. Jury Instructions 9-107, 9-107(a), 9-110, 9-110(a), 9-111, 9-111(a) (2009)
20	New Hampshire	N.H. Rev. Stat. Ann. § 318-B:2(I)	N.H. Crim. Jury Instructions 318-B:2, I (2010)
21	New Jersey	N.J. Stat. Ann. §§ 2C:35-3, 2C:35-5	N.J. Model Charges 2C:35-3 (2014)
22	New Mexico	N.M. Stat. Ann. § 30-31-25.1	N.M. Uniform Jury Instructions: Crim. Instruction 14-3112 (2014)
23	New York	N.Y. Penal Law §§ 220.70, 220.71, 220.72, 220.73, 220.74, 220.75	N.Y. Crim. Jury Instructions 220.70, 220.71, 220.72, 220.73, 220.74, 220.75 (2003)

24	North Carolina	N.C. Gen. Stat. § 90-95(a)(1)	N.C. Pattern Jury Instructions: Crim. Instructions 260.15, 260.19, 260.20A (2013)
25	North Dakota	N.D. Cent. Code § 19-03.1-23-1	N.D. Pattern Jury Instructions: Crim. Instruction § 22.20 (1994)
26	Ohio	Ohio Rev. Code Ann. § 2925.04	Ohio Jury Instructions: Crim. Instruction 525.04 (2014)
27	Oklahoma	Okla. St. tit. 63 §§ 2-401(A)(1), 2-401(A)(2), 2-401(G)(1)	Vernon's Okla. Uniform Jury Instructions: Crim. Instructions 6-3A, 6-3B, 6-4 (2d ed.)
28	Oregon	Or. Rev. Stat. §§ 475.752(1), 475.752(2), 475.962, 475.967	Or. Uniform Crim. Jury Instructions 2608, 2613 (2013)

29	Pennsylvania	35 Pa. Cons. Stat. §§ 780-113 (a)(30), 780-113 (a)(36)	Pa. Suggested Standard Crim. Jury Instructions 16.01, 16.13(a)(30)A (2012)
30	South Carolina	S.C. Code Ann. §§ 44-53-370(a), 44-53-375	S.C. Suggested Jury Instructions: Crim. Instructions pp. 129-33 (2014)
31	Tennessee	Tenn. Code Ann. §§ 39-17-417, 39-17-430(b), 39-17-431(m)(1)(B), 39-17-433(a)(2)-(3), 39-17-435(a), 39-17-438(a)(1), 39-17-452(a), 39-17-453(a), 39-17-454(c), 53-11-401(a)(2)	Tenn. Pattern Jury Instructions: Crim. Instruction 31.01 (2014)

32	Texas (except unclear for simulated controlled substances)	Tex. Health & Safety Code Ann. §§ 481.112, 481.1121, 481.113, 481.114, 481.124, 481.128(a)(2), 482.002	Texas Crim. Jury Charges 13:280, 13:290, 13:300, 13:310, 13:320, 13:360 (2008)
33	Vermont	Vt. Stat. Ann. tit. 18 §§ 4205, 4228(a), 4230(a), 4236	Vt. Crim. Jury Instructions 4-40-026, 4-40-036, 4-40-046 (2005)
34	Virginia (except imitated controlled substance)	Va. Code Ann. §§ 18.2-248, 18.2-248.03, 18.2-248.5, 18.2-251.2, 18.2-251.3	1-22 Va. Model Jury Instructions: Crim. Instructions G22.100, G22.120, G22.160, G22.270, G22.275, G22.300, G22.310, G22.400, G22.610 (2014)

35	Washington	Wash. Rev. Code §§ 69.50.401, 69.50.4011, 69.50.4012, 69.50.402, 69.50.403, 69.50.416	11 Wash. Prac. Pattern Jury Instructions: Crim. Instruction 50.11, 50.14, 50.50 (3d ed.)
36	Wisconsin	Wis. Stat. §§ 961.41(1), 961.574	Wis. Jury Instructions: Crim. Instructions 6021, 6036, 6065 (2014)
37	Wyoming	Wyo. Stat. Ann. §§ 35-7-1031(a), 35-7-1032(a)(ii), 35-7-1040	Wyo. Crim. Pattern Jury Instructions 111.02, 111.03, 111.09 (2009)

Table 3.B 3 Jurisdictions Provide Statutory Text or Pattern Jury Instructions Not Prompting Identification of a Particular Controlled Substance for Manufacturing Offenses			
Jurisdiction		**Statute(s)**	**Pattern Jury Instruction(s)**
1	Alaska (except where statute specifies methampheta mine)	Alaska Stat. §§ 11.71.020, 11.71.030, 11.71.040, 11.71.050	Alaska Crim. Pattern Jury Instructions 11.71.020(a)(1), (a)(2), 11.71.030(a)(1), 11.71.040(a)(1), (a)(2), 11.71.050(a)(1) (2014)
2	Arizona (except where statute specifies marijuana)	Ariz. Rev. Stat. Ann. §§ 13-3405, 13-3407, 13-3408, 13-3453	Ariz. Pattern Jury Instructions: Crim. Instructions 34.053, 34.53 (2014)
3	Colorado (except methampheta mine, heroin, ketamine, marijuana and cathinones)	Colo. Rev. Stat. §§ 18-18-405, 18-18-406(2)	Colo. Jury Instructions: Crim. Instruction 18:05

Table 3.C
12 Jurisdictions Provide Statutory Text or Pattern Jury Instructions that are Unclear on Identification of a Particular Controlled Substance or Lack Jury Instructions for Manufacturing Offenses

Jurisdiction		Statute(s)	Pattern Jury Instruction(s)
1	Connecticut	Conn. Gen. Stat. § 21a-277	N/A
2	Delaware (except where statute specifies marijuana)	Del. Code Ann. tit. 16 §§ 4752, 4753, 4754, 4755, 4756, 4763, 4764	N/A
3	District of Columbia	D.C. Code §§ 48-904.01(a), 48-904.01(b), 48-904.02	N/A
4	Hawaii (only for manufacture of substances other than meth and marijuana)	Haw. Rev. Stat. §§ 712-1240.7, 712-1241, 712-1249.4, 712-1249.5	Haw. Standard Crim. Jury Instructions 13.37, 13.38, 13.42, 13.43, 13.51, 13.52, 13.61 (2014)
5	Maine (except where statute specifies marijuana)	Me. Rev. Stat. tit. 17-A §§ 1103, 1104, 1106, 1107, 1108, 1109, 1116, 1117	1-6 Me. Jury Instructions Manual §§ 6-36 (2014)

6	Nebraska (except where specified by statute)	Neb. Rev. Stat. §§ 28-416(1), 28-416(4)	Neb. Jury Instructions: Crim. Instruction 4.2 (2010)
7	Nevada (except where statute specifies marijuana)	Nev. Rev. Stat. §§ 453.321, 453.322, 453.3385, 453.339, 453.3393, 453.3395, 453.332(1), 453.332(3), 453.336, 453.337, 453.338, 453.3385, 453.339, 453.3395	N/A
8	Rhode Island	R.I. Gen. Laws § 21-28-4.01(a), (b)	N/A
9	South Dakota	S.D. Codified Laws §§ 22-42-2, 22-42-3, 22-42-4	N/A

10	Utah	Utah Code Ann. §§ 58-37-8, 58-37b-4, 58-37b-6, 58-37c-3(11)(b), (k), 58-37d-4(1)(a), (f), (h)	N/A
11	West Virginia	W. Va. Code §§ 60A-4-401, 60A-4-413	N/A
12	Federal Controlled Substances Act	21 U.S.C. § 841(a)	N/A

AMICUS CURIAE BRIEF

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MOONES MELLOULI,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF IMMIGRATION LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. COURTS AND THE AGENCY HAVE LONG APPLIED THE CATEGORICAL APPROACH TO ASSESS THE IMMIGRATION CONSEQUENCES OF CONVICTIONS, INCLUDING DRUG CONVICTIONS 3

A. The categorical approach has long required courts and agency officials to assess the minimum conduct proscribed under a criminal statute in order to determine whether an individual was necessarily "convicted" of a given offense 7

B. Where Congress has predicated adverse immigration consequences on whether an individual has been "convicted" of a violation of any law "relating to" specified controlled substances, the categorical approach has long applied 13

TABLE OF CONTENTS – Continued

Page

C. The categorical approach has historically applied to assessing both whether a noncitizen was convicted of the type of drug *activity* and the type of *substance* required under the relevant conviction-based immigration provision 18

D. Immigration officials have considered the term "relating to" when assessing whether an individual was convicted of the relevant type of drug activity, not as a basis for ignoring the requirement that an individual be convicted of the relevant type of substance 22

II. RESPONDENT'S POSITION CONFLICTS WITH THE PROPER APPLICATION OF THE LONGSTANDING CATEGORICAL APPROACH IN THE DRUG CONTEXT.... 26

A. There is no "drug trade" exception to the categorical approach when assessing drug convictions 29

B. No "legal imagination" is required here 31

C. The categorical approach does not vary based on burden of proof 34

CONCLUSION 38

APPENDIX

List of Amici Curiae 1a

TABLE OF AUTHORITIES

Page

CASES

Bobadilla v. Holder, 679 F.3d 1052 (8th Cir. 2012) 12

Carachuri-Rosendo v. Holder, ___ U.S. ___, 130 S. Ct. 2577 (2010) 5

Descamps v. United States, ___ U.S. ___, 133 S. Ct. 2276 (2013) 4, 5

Fajardo v. Att'y Gen., 659 F.3d 1303 (11th Cir. 2011) 12, 37

Gonzalez v. Duenas-Alvarez, 549 U.S. 183 (2007) ..... *passim*

Jean-Louis v. Att'y Gen., 582 F.3d 462 (3d Cir. 2009) 12

Judulang v. Holder, ___ U.S. ___, 132 S. Ct. 476 (2011) 37

Leocal v. Ashcroft, 543 U.S. 1 (2004) 5

Lopez v. Gonzalez, 549 U.S. 47 (2006) 5

Lorillard v. Pons, 434 U.S. 575, 580 (1978) 8

Martinez v. Mukasey, 551 F.3d 113 (2d Cir. 2008) 36

Mata-Guerrero v. Holder, 627 F.3d 256 (7th Cir. 2010) 12

Mellouli v. Holder, 719 F.3d 995 (8th Cir. 2013) 27, 32

Moncrieffe v. Holder, ___ U.S. ___, 133 S. Ct. 1678 (2013) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Olivas-Motta v. Holder, 716 F.3d 1199 (9th Cir. 2013) 12

Prudencio v. Holder, 669 F.3d 472 (4th Cir. 2012) 12

Ramos v. U.S. Att'y Gen., 709 F.3d 1066 (11th Cir. 2013) 33

Silva-Trevino v. Holder, 742 F.3d 197 (5th Cir. 2014) 12

United States ex rel. Guarino v. Uhl, 107 F.2d 399 (2d Cir. 1939) 9, 10

United States ex rel. Mylius v. Uhl, 203 F. 152 (S.D.N.Y. 1913) 9

United States ex rel. Mylius v. Uhl, 210 F. 860 (2d Cir. 1914) 9, 36

United States ex rel. Zaffarano v. Corsi, 63 F.2d 757 (2d Cir. 1933) 11

United States v. Aparicio-Soria, 740 F.3d 152 (4th Cir. 2014) 34

United States v. Grisel, 488 F.3d 844 (9th Cir. 2007) 33

United States v. Hayes, 555 U.S. 415 (2009) 8

BOARD OF IMMIGRATION APPEALS DECISIONS

Matter of Abreu-Semino, 12 I. & N. Dec. 775 (B.I.A. 1968) 21

Matter of B-, 4 I. & N. Dec. 493 (B.I.A. 1951) 12

TABLE OF AUTHORITIES – Continued

Page

Matter of B-, 5 I. & N. Dec. 479 (B.I.A. 1953)....17, 18, 19

Matter of D-S-, 3 I. & N. Dec. 502 (B.I.A. 1949).....16, 17, 19

Matter of Bronsztejn, 15 I. & N. Dec. 281 (B.I.A. 1975).....23

Matter of Carrillo, 16 I. & N. Dec. 625 (B.I.A. 1978).....23

Matter of Fong, 10 I. & N. Dec. 616 (B.I.A. 1964).....21, 24

Matter of Hernandez-Ponce, 19 I. & N. Dec. 613 (B.I.A. 1988).....24

Matter of H-U-, 7 I. & N. Dec. 533 (B.I.A. 1957).....24

Matter of L-, 5 I. & N. Dec. 169 (B.I.A. 1953).....18, 19

Matter of L-C-, 2990174 (B.I.A. May 30, 1945).....17

Matter of M-, 9 I. & N. Dec. 181 (B.I.A. 1961).....20

Matter of Martinez Espinoza, 25 I. & N. Dec. 118 (B.I.A. 2009).....*passim*

Matter of Martinez Gomez, 14 I. & N. Dec. 104 (B.I.A. 1972).....25, 30

Matter of McClendon, 12 I. & N. Dec. 233 (B.I.A. 1967).....20

Matter of P-, 3 I. & N. Dec. 56 (B.I.A. 1947).....12, 36

Matter of Paulus, 11 I. & N. Dec. 274 (B.I.A. 1965).....21, 29, 30, 34

Matter of R-M-, 8 I. & N. Dec. 397 (B.I.A. 1959).....24

TABLE OF AUTHORITIES – Continued

Page

Matter of Schunck, 14 I. & N. Dec. 101 (B.I.A. 1972) 25

Matter of Sum, 13 I. & N. Dec. 569 (B.I.A. 1970) 24

Matter of T-, 2 I. & N. Dec. 22 (B.I.A. 1944) 36

Matter of Velasco, 16 I. & N. Dec. 281 (B.I.A. 1977) 23

Matter of Velazquez-Herrera, 24 I. & N. Dec. 503 (B.I.A. 2008) 38

ATTORNEY GENERAL DECISIONS

Attorney General Op., 37 Op. Att'y Gen. 293 (A.G. 1933) 36

Matter of S-, 2 I. & N. Dec. 353 (B.I.A., A.G. 1945) 11

Matter of Silva-Trevino, 24 I. & N. Dec. 687 (A.G. 2008) 12

Matter of N-, 6 I. & N. Dec. 557 (B.I.A., A.G. 1955) 23

Op. of Hon. Cummings, 37 Op. Att'y Gen. 293 (A.G. 1933) 11

STATUTES

8 U.S.C. § 1182(a)(1)(A)(iv) 15

8 U.S.C. § 1182(a)(2)(A)(i) 16

8 U.S.C. § 1182(a)(2)(A)(i)(II) 6, 37

8 U.S.C. § 1182(a)(2)(C) 15

TABLE OF AUTHORITIES – Continued

Page

8 U.S.C. § 1182(h) 37

8 U.S.C. § 1227(a)(2)(B)(i) 6, 26, 30, 37

8 U.S.C. § 1227(a)(2)(B)(ii) 15

8 U.S.C. § 1229a(c)(2)(A) 35

8 U.S.C. § 1229a(c)(3)(A) 35

8 U.S.C. § 1229a(c)(4)(A) 35

8 U.S.C. § 1229b(b)(1)(C) 37

21 U.S.C. § 802 ..... *passim*

Act of Mar. 3, 1875, 18 Stat. 477 8

Act of Mar. 3, 1891, 26 Stat. 1084 8

Act of Feb. 20, 1907, 34 Stat. 898 8

Act of Feb. 18, 1931, 46 Stat. 1171 13

Act of June 28, 1940, 54 Stat. 673 14

Act of July 18, 1956, 70 Stat. 567 14

Act of July 14, 1960, 74 Stat. 504 14

Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 15

Immigration and Nationality Act of 1952, 66 Stat. 204 ..... *passim*

Kan. Stat. Ann. § 21-5701 26

Kan. Stat. Ann. § 21-5709(b)(2) 26

Narcotic Drugs Import and Export Act of 1909, *as amended by* Act of May 26, 1922, 42 Stat. 596 13

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting the Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1725-46 (2011) 5, 12, 16, 36

Doug Keller, *Causing Mischief for Taylor's Categorical Approach: Applying "Legal Imagination" to* Duenas-Alvarez, 18 GEO. MASON L. REV. 625, 637-67 (2011) 32, 33

Jennifer Lee Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257, 295-310 (2012) 5

Madrigal-Barcenas v. Holder, No. 13-697, Resp. Br. in Opp. to Cert.....27, 34

Rebecca Sharpless, *Toward a True Elements Test: Taylor and the Categorical Analysis of Crimes in Immigration Law*, 62 U. MIAMI L. REV. 979, 1032-34 (2008) 5

STATEMENT OF INTEREST

Amici curiae are 92 professors of law who specialize in immigration law, including its intersection with administrative and criminal law. *Amici* have an interest in this Court's consideration of the development and proper application of the categorical approach, which has served as a bedrock principle of immigration adjudications involving criminal convictions for over a century. *Amici* submit this brief to provide the Court with the history and principles behind the categorical approach in the immigration context, to describe immigration officials' long-standing application of this approach to analyzing drug convictions, and to illustrate how Respondent's position conflicts with statutory requirements and precedent in this arena. The names, titles, and institutional affiliations (for identification purposes only) of *amici* are listed in an Appendix.[1]

SUMMARY OF ARGUMENT

As this Court recently recognized in *Moncrieffe v. Holder*, ___ U.S. ___, 133 S. Ct. 1678, 1685 (2013), immigration adjudicators have applied the categorical

[1] Pursuant to Rule 37, *amici* state that no counsel for a party authored any part of this brief, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. Petitioner and Respondent have consented to the filing of this brief. Letters of consent have been filed with the Clerk of the Court.

approach to determine whether a person has been "convicted" of an offense triggering immigration consequences for over a century. This approach, grounded in Congress's requirement that noncitizens be "convicted" of certain types of offenses to face specified grounds of removal or bars to relief, has been affirmed by case after case and repeatedly reenacted by Congress since it first specified a conviction requirement in the statute in 1875. This approach requires immigration adjudicators to determine the immigration consequences of a conviction based solely on the minimum conduct that is necessarily established by the conviction under the applicable criminal statute, not the underlying facts.

First developed in the context of "crimes involving moral turpitude," the categorical approach has long applied to the determination of whether a noncitizen has been convicted of the type of controlled substance offense that triggers immigration consequences under federal immigration law. This has included a categorical inquiry into both the type of drug activity and the type of substance proscribed by statute.

Respondent's position is at fundamental odds with this long-established approach in immigration cases. Under Respondent's position, noncitizens convicted of the possession of drug paraphernalia – a minor offense in many state and local jurisdictions (and one that is not criminalized federally) – would be deportable regardless of whether the conviction involved a federally controlled substance. The

consequences of this position are severe. Minor offenses that involve substances not proscribed under federal law could subject noncitizens to deportation, detention, and in some cases bar them from seeking relief from removal.

This brief is organized in two points. Point I describes the century of jurisprudence affirming Congress's choice of a categorical approach for the assessment of convictions by immigration adjudicators, including controlled substance offenses. It demonstrates immigration officials' longstanding recognition of the importance of tethering the conviction to the relevant type of controlled substance. Point II illustrates how Respondent's position conflicts with this longstanding approach.

ARGUMENT

I. COURTS AND THE AGENCY HAVE LONG APPLIED THE CATEGORICAL APPROACH TO ASSESS THE IMMIGRATION CONSEQUENCES OF CONVICTIONS, INCLUDING DRUG CONVICTIONS.

Courts and the agency have long applied the categorical approach in determining whether a criminal disposition leads to immigration consequences that are based on a "conviction" of an offense. Under the categorical approach, immigration adjudicators may consider only the minimum conduct proscribed by the statute of conviction in determining the immigration

consequences of the past conviction. *See Moncrieffe*, 133 S. Ct. at 1684 (holding that immigration adjudicators must determine only "what the state conviction necessarily involved," requiring a presumption that the conviction "rested on nothing more than the least of the acts criminalized" (quotation marks omitted)). Where the statute proscribes alternate offenses – some of which carry immigration consequences and some of which do not – the "modified" categorical approach permits immigration adjudicators to review the record of conviction to determine which offense constituted the basis for the conviction. *See id.* (explaining the modified categorical approach's application to "state statutes that contain several different crimes, each described separately" permitting a court to review the record of conviction "to determine which particular offense the noncitizen was convicted of" (citations omitted)); *see also Descamps v. United States*, ___ U.S. ___, 133 S. Ct. 2276, 2284 (2013) (explaining that the modified categorical approach applies when a "statute is 'divisible' – i.e., comprises multiple, alternative versions of the crime," and thus operates as "a tool for implementing the categorical approach, to examine a limited class of documents to determine which of a statute's alternative elements formed the basis of the defendant's prior conviction" (citation omitted)). Under no circumstances may an immigration adjudicator consider or assume facts beyond those necessary for the conviction.

Grounded in Congress's choice to predicate certain immigration consequences on convictions, the

categorical approach ensures fairness, uniformity, and predictability in the administration of immigration law. *See* Jennifer Lee Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257, 295-310 (2012) (analyzing rationales for the categorical approach in the immigration context); Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting the Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1725-46 (2011) (same); Rebecca Sharpless, *Toward a True Elements Test: Taylor and the Categorical Analysis of Crimes in Immigration Law*, 62 U. MIAMI L. REV. 979, 1032-34 (2008) (same).

Over the years, this Court has applied the categorical and/or modified categorical approach in both the criminal sentencing and immigration contexts. In *Descamps*, the Court most recently applied the categorical approach to determine if a prior conviction triggered federal sentencing enhancement under the Armed Career Criminal Act. 133 S. Ct. at 2285-86. Similarly, the Court has applied a categorical approach in a number of immigration cases predicated on past convictions. *See Moncrieffe*, 133 S. Ct. at 1685; *Carachuri-Rosendo v. Holder*, ___ U.S. ___, 130 S. Ct. 2577 (2010); *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183 (2007); *see also Lopez v. Gonzalez*, 549 U.S. 47 (2006); *Leocal v. Ashcroft*, 543 U.S. 1 (2004).

These recent cases reinforce the applicability of the categorical approach in this case. For controlled substance conviction-based grounds of removability

and bars to relief, immigration adjudicators must rely only on the minimum conduct necessary for the conviction to determine whether the conviction qualifies as a controlled substance offense – the crux of the issue here being whether an individual has been convicted of a violation of a law "relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))." 8 U.S.C. § 1227(a)(2)(B)(i); *see also* 8 U.S.C. § 1182(a)(2)(A)(i)(II).

Respondents seek to read out the definitional provision of what constitutes a controlled substance from the statute and, by doing so, bypass the dictates of the categorical approach in this case. Yet the possibility that some noncitizens may be convicted of foreign, state, or local drug offenses that are not related to federally controlled substances is not new. Since Congress first predicated adverse immigration consequences of certain types of drug convictions, immigration adjudicators have had to assess whether noncitizens' convictions involved the relevant type of controlled substance for purposes of deportation. This inquiry has applied regardless of the type of offense – possession, sale, or other types of drug offenses – for decades.

This section of the brief outlines the principles behind the categorical approach and describes their proper application in the immigration context. Part I.A describes the development of the categorical approach. Part I.B describes the application of the categorical approach to drug convictions. Part I.C describes how these rules have applied to inquiries

regarding both the type of drug activity and the type of substance necessary for conviction. Part I.D explains how the term "relating to" has been historically used by immigration officials to assess whether an individual was necessarily convicted of the relevant type of drug activity, not as a basis to ignore the requirement that an individual be convicted of the relevant type of substance specified in the statute.

A. The categorical approach has long required courts and agency officials to assess the minimum conduct proscribed under a criminal statute in order to determine whether an individual was necessarily "convicted" of a given offense.

The categorical approach has been applied in the immigration context for over a century. It is relied upon by front-line immigration officers and immigration judges every day to decide thousands of claims regarding conviction-based grounds of removability and bars to status or relief from removal. Congress, aware of the streamlined administrative nature of these adjudications, has repeatedly required that immigration officials and courts rely only on what is established by the conviction itself, i.e., the minimum conduct established by the criminal court's adjudication of the case based on the criminal statute. This test is well-established in case law interpreting Congress's conviction requirement, which Congress has repeatedly utilized when adding certain grounds

of removal and bars to status or relief in federal immigration law. *See United States v. Hayes*, 555 U.S. 415, 424-25 (2009) ("[W]hen judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well." (citation omitted)); *see also Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

Since 1875, Congress has premised specific immigration consequences on certain types of *convictions*. *See* Act of Mar. 3, 1875, ch. 141, § 5, 18 Stat. 477, 477 (excluding "persons who are undergoing a sentence for conviction in their own country of felonious crimes"); Act of Mar. 3, 1891, ch. 551 § 1, 26 Stat. 1084, 1084 (excluding "persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude"). Congress chose language requiring a conviction to trigger some immigration consequences, while prescribing a conduct-based standard for others. *Compare id. with* Act of Feb. 20, 1907, ch. 1134, § 3, 34 Stat. 898, 900 ("[A]ny alien woman or girl practicing prostitution, at any time within three years after she shall have entered the United States, shall be deemed to be unlawfully within the United States and shall be deported").

In examining Congress's use of the "convicted" language in early federal immigration cases, courts concluded that Congress intended to limit the authority of immigration adjudicators to determine

consequences based on the conviction rather than the underlying conduct. One of the first cases discussing this requirement is *United States ex rel. Mylius v. Uhl*, in which a noncitizen challenged his detention and exclusion from the United States on the basis of a prior conviction for criminal libel in England. 203 F. 152, 153 (S.D.N.Y. 1913). Immigration officials had concluded that the petitioner had been "convicted" of an offense "involving moral turpitude" by reviewing reports of the trial and the underlying facts that gave rise to his conviction. *Id.* Judge Noyes, writing for the federal district court in the Southern District of New York, concluded that the immigration officials erred by not confining their review to the "inherent nature" of the statutory offense of criminal libel, which "depends upon what *must be shown* to establish [the noncitizen's] guilt." *Id.* at 154 (emphasis added). Under this inquiry, the court held that libel did not necessarily involve moral turpitude, for libel convictions could be obtained where defendants violated the statute without intent or knowledge. *Id.* The Second Circuit affirmed, holding that Congress did not intend for immigration officers to "act as judges of the facts to determine from the testimony in each case whether the crime of which the immigrant is convicted does or does not involve moral turpitude.
this question must be determined from the judgment of conviction." *United States ex rel. Mylius v. Uhl*, 210 F. 860, 863 (2d Cir. 1914).

This reading of the statute was further reinforced by Judge Learned Hand in a series of cases. In *United*

States ex rel. Guarino v. Uhl, Judge Hand addressed the issue of whether a conviction for possession of a "jimmy," a common burglary tool, with intent to commit a crime was properly classified as a crime involving moral turpitude. 107 F.2d 399, 400 (2d Cir. 1939). Judge Hand focused the inquiry upon "whether all crimes which [the petitioner] may intend are 'necessarily,' or 'inherently,' immoral." *Id.* Judge Hand observed that the statute of conviction covered conduct that could be "no more than a youthful prank" born of "curiosity, or a love of mischief." *Id.* Focused upon this minimum level of conduct, Judge Hand stated that "it would be to the last degree pedantic to hold that [the conviction] involved moral turpitude and to visit upon it the dreadful penalty of banishment." *Id.* While acknowledging that "other circumstances [made] it highly unlikely that this alien had possession of the jimmy for [a] relatively innocent purpose," Judge Hand nevertheless honored the minimum conduct test, holding that "[deportation] officials may not consider the particular conduct for which the alien has been convicted, and indeed this is a necessary corollary of the doctrine itself." *Id.*

The categorical approach was also applied in cases in which a noncitizen had been convicted under a so-called "divisible" statute – one proscribing multiple, separate offenses, only some of which necessarily trigger specific immigration consequences. In such cases, courts permitted immigration adjudicators to examine the official record of conviction – not as an inquiry into the facts underlying the conviction, but

rather for the limited purpose of determining which offense within the statute served as the basis for the noncitizen's conviction. This test – which courts later termed a "modified categorical approach" – was applied in the seminal case *United States ex rel. Zaffarano v. Corsi*, 63 F.2d 757 (2d Cir. 1933). The Second Circuit assessed whether a noncitizen's prior conviction for second degree assault under New York law necessarily involved moral turpitude. *Id.* Finding that the state offense defined second degree assault through five subdivisions specifying different offenses, only some of which inherently involved moral turpitude, the court held that immigration officials could look to "the charge (indictment), plea, verdict, and sentence" to determine "the specific criminal charge of which the alien is found guilty and for which he is sentenced." *Id.* at 759. The court further held that the inquiry was limited solely to this "record of conviction," permitting immigration adjudicators to determine only which subsection gave rise to the noncitizen's conviction. *Id.* at 757. The court reaffirmed the minimum conduct test, holding that "[t]he evidence upon which the verdict was rendered may not be considered." *Id.* at 759.

The reasoning of these early federal court decisions was also adopted by the Attorney General and the Board of Immigration Appeals ("B.I.A.") soon after its formation. *See Op. of Hon. Cummings*, 37 Op. Att'y Gen. 293 (A.G. 1933) (applying a categorical approach to convictions); *see also Matter of S-*, 2 I. & N. Dec. 353 (B.I.A., A.G. 1945) (same). In doing so,

both the Attorney General and the B.I.A. have looked to the minimum conduct necessary under a conviction to determine deportation or exclusion consequences. *See, e.g.*, *Matter of B-*. 4 I. & N. Dec. 493, 496 (B.I.A. 1951) ("[T]he definition of the crime must be taken at its minimum an administrative body must follow definite standards, apply general rules, and refrain from going behind the record of conviction."); *Matter of P-*, 3 I. & N. Dec. 56, 59 (B.I.A. 1947) ("[A] crime must by its very nature and at its minimum, as defined by the statute, involve an evil intent before a finding of moral turpitude would be justified.").

The categorical approach has remained the dominant inquiry in immigration cases, whether the provision relates to having been convicted of a crime involving moral turpitude or other immigration grounds, such as the controlled substance ground of removability.[2] *See* Das, 86 N.Y.U. L. REV. at 1688-1702, 1749-1752 (describing the historical

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[2] The Attorney General recently departed in part from the categorical approach for crimes involving moral turpitude in *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (A.G. 2008), *overruled in Silva-Trevino v. Holder*, 742 F.3d 197 (5th Cir. 2014). A majority of federal circuits have rejected *Silva-Trevino* as contrary to Congressional intent requiring a categorical approach. *See Silva-Trevino*, 742 F.3d at 198; *Olivas-Motta v. Holder*, 716 F.3d 1199 (9th Cir. 2013); *Prudencio v. Holder*, 669 F.3d 472 (4th Cir. 2012); *Fajardo v. Att'y Gen.*, 659 F.3d 1303 (11th Cir. 2011); *Jean-Louis v. Att'y Gen.*, 582 F.3d 462 (3d Cir. 2009); *but see Bobadilla v. Holder*, 679 F.3d 1052 (8th Cir. 2012); *Mata-Guerrero v. Holder*, 627 F.3d 256 (7th Cir. 2010).

development of the categorical approach in immigration law and collecting cases).

B. Where Congress has predicated adverse immigration consequences on whether an individual has been "convicted" of a violation of any law "relating to" specified controlled substances, the categorical approach has long applied.

In the context of federal drug regulation, Congress has long premised adverse immigration consequences on convictions. *See* Narcotic Drugs Import and Export Act of 1909, ch. 100, 35 Stat. 614, *as amended by* Act of May 26, 1922, ch. 202, 42 Stat. 596, 597 (specifying that "any alien who at any time after his entry is *convicted* under subdivision (c) [narcotics offense under the act] shall, upon the termination of the imprisonment be taken into custody and deported" (emphasis added)); Act of Feb. 18, 1931, ch. 224, 46 Stat. 1171, 1171 (providing that a noncitizen "*convicted* and sentenced for violation or conspiracy to violate any statute of the United States taxing, prohibiting, or regulating the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, or any salt, derivative, or preparation of opium or coca leaves" shall be detained and deported (emphases added)).

Over time, Congress expanded the bases by which a drug conviction may trigger immigration consequences, without changing the requirement that a conviction is required. In 1940, Congress eliminated the prior law's requirement of a sentence thus making a conviction alone sufficient for deportation, and extended the provisions to apply to any noncitizens convicted under state and federal law. *See* Act of June 28, 1940, ch. 439, title III, § 30, 54 Stat. 673. In 1952, Congress broadened the grounds of drug-conviction-based deportability to make deportable any noncitizen "who at any time has been *convicted* of a violation of any law or regulation relating to the illicit traffic in narcotic drugs" or "who has been *convicted* of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction sustaining opiate." Immigration and Nationality Act of 1952, ch. 5, § 241, 66 Stat. 204, 206-07 (emphasis added). In 1956, Congress amended the Immigration and Nationality Act to include convictions for "illicit possession" of narcotic drugs. Act of July 18, 1956, ch. 629, title III, § 301, 70 Stat. 567, 575. In 1960, Congress further expanded the act to include convictions for "illicit possession" of marijuana. Act of July 14, 1960, Pub. L.

No. 86-648, 74 Stat. 504, 505. By 1986, Congress replaced the lengthy list of various types of drug offenses involving various types of controlled substances (which had included narcotics, marijuana, opiates, heroin, and other specific drugs) with the present-day framework, predicated on the conviction of any violation of a law relating to a controlled substance defined in 21 U.S.C. § 802, i.e., the federal schedules. *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-47 (allowing deportation for a noncitizen "*convicted* of . a violation of . . any law . . of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21)").

Not all drug-based immigration consequences were predicated on convictions, however. Congress also attached consequences to any individual deemed a "drug addict," Immigration and Nationality Act of 1952, ch. 5, § 241, 66 Stat. 204, 206, or whom "officers know or have reason to believe is or has been an illicit trafficker in any of the aforementioned drugs," Immigration and Nationality Act of 1952, ch. 2, § 212, 66 Stat. 182, 184. These provisions continue to exist in the present-day version of the statute. 8 U.S.C. §§ 1182(a)(1)(A)(iv) ("drug abuser or addict" inadmissibility), 1182(a)(2)(C) ("reason to believe illicit trafficker" inadmissibility), 1227(a)(2)(B)(ii) ("drug abuser or addict" deportability). The present-day version of the statute also makes inadmissible (but not deportable) a person who "admits" the commission of violation of law relating to a controlled substance (as

defined by 21 U.S.C. § 802). 8 U.S.C. §1182(a)(2)(A)(i); *see also* Das, 86 N.Y.U. L. REV. at 1689-90 (discussing the limitations on application of "admits" terminology).

In interpreting these various drug provisions, the federal immigration agency applied the categorical approach to the provisions predicated on convictions. In the 1949 case *Matter of D-S-*, the B.I.A. considered whether a noncitizen's federal marijuana conviction rendered him deportable as someone "*convicted* for the violation of a (Federal) statute ' taxing, prohibiting, or regulating the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of marihuana. '" under the applicable statute. 3 I. & N. Dec. 502, *1-2 (B.I.A. 1949) (emphasis added, citation omitted). Examining the indictment, the B.I.A. concluded that the noncitizen had been convicted of the unlawful possession of marijuana, which was not proscribed under the relevant immigration provision at the time. *Id.* at *2-3. The issue was whether the immigration judge was entitled to examine the noncitizen's testimony in immigration proceedings to go behind the record of conviction to assess whether the underlying conduct would trigger deportation. *Id.* at *4. Rejecting this factual inquiry and overruling a prior case that had deemed such an inquiry permissible, the B.I.A. explained that the statute required the categorical approach and thus prohibited immigration officials from going beyond the record of conviction:

> It is well settled in immigration proceedings that the nature of the crime is conclusively established by the record of conviction consisting of the charge or indictment, the plea, the verdict and sentence. We are not permitted to go behind this record to determine purpose, motive, or facts, either favorable or unfavorable to the alien. The act of February 18, 1931, does not empower us to retry a closed narcotic case.

Id. at *4-5 (overruling *Matter of L-C-*, 2990174 (B.I.A. May 30, 1945)).

Since *Matter of D-S-*, the B.I.A. has consistently applied the categorical approach to the assessment of drug convictions. In doing so, the B.I.A. distinguished provisions that predicated consequences on drug *convictions* from provisions that were not tethered to convictions. In the 1953 case *Matter of B-*, for example, the B.I.A. rejected any reliance on facts beyond the record of conviction to determine if a noncitizen was convicted of the type of drug offense that rendered him deportable under immigration law. 5 I. & N. Dec. 479, *5 (B.I.A. 1953) (holding that "we are bound by the record of conviction and are precluded from going behind such record to the testimony of the respondent or to other evidence to establish the ground of deportability herein"). In doing so, the B.I.A. observed that had the relevant immigration charge not required a conviction (such as the provision that provided for exclusion if there were "reason to believe" the person engaged in illicit trafficking), then a factual inquiry would have been permissible.

Id. at *5-6. But because Congress predicated the particular adverse immigration consequences on drug convictions, the categorical approach had to apply. *Id.*; *see also Matter of L-*, 5 I. & N. Dec. 169 (B.I.A. 1953) (rejecting immigration officials' request to look beyond record of conviction to determine whether a possession conviction actually involved the trafficking of narcotics under the relevant immigration provision). Thus the categorical approach has long applied to the assessment of controlled substance offenses where Congress predicated consequences on such convictions.

C. The categorical approach has historically applied to assessing both whether a noncitizen was convicted of the type of drug *activity* and the type of *substance* required under the relevant conviction-based immigration provision.

The categorical assessment of the immigration consequences of drug convictions has historically involved two main inquiries. First, immigration officials have to assess whether the individual was convicted of the type of *drug activity* that was listed in the relevant immigration provision. Second, immigration officials have to assess whether the individual was convicted of a violation involving the type of *substance* that was listed in the relevant immigration provision. The categorical approach has long applied to both inquiries.

The B.I.A. has long grappled with the first inquiry, determining whether a noncitizen was convicted of the relevant type of drug activity. The scope of this inquiry has changed with various versions of drug-related immigration provisions. For example, prior to "possession" being added to the list of grounds for deportation, several cases arose where immigration officials would assess whether an individual's conviction was for possession (and thus not a deportable offense) or for trafficking (a deportable offense). In those cases, the categorical approach has consistently applied. *See Matter of L-*, 5 I. & N. Dec. 169 (B.I.A. 1953) (rejecting immigration officials' request to look beyond record of conviction to determine whether a possession conviction actually involved trafficking); *Matter of B-*, 5 I. & N. Dec. 479 (B.I.A. 1953) (same); *Matter of D-S-*, 3 I. & N. Dec. 502 (B.I.A. 1949) (same).

Similarly, immigration officials have long had to assess whether the individual was convicted of a violation involving the type of *substance* that was listed in the relevant immigration provision using the categorical approach. Over the various iterations of drug-related immigration provisions, all have been statutorily connected to specific types of drugs, whether defined as "narcotics," "narcotics or marihuana," a list including "opium, coca leaves, heroin, marihuana," or eventually "a controlled substance (as defined in section 802 of title 21)." *See* Point I.B, *supra*. Noncitizens who were not convicted of the

relevant type of controlled substance would therefore raises challenges in their removal cases.

In some of these challenges, the statute or record of conviction specified the type of drug, and the noncitizen would challenge whether that drug was of the type proscribed under the relevant immigration provision. Immigration officials would accordingly engage in an analysis of whether the type of drug at issue matched the type of drug specified in the immigration statute. For example, at various points over the last several decades, the B.I.A. has issued decisions assessing whether opium poppy, LSD, and Demerol were the type of substances proscribed under various provisions of immigration law. *See Matter of McClendon*, 12 I. & N. Dec. 233 (B.I.A. 1967) (holding that a conviction for obtaining Demerol for personal use triggers deportation under the Immigration and Nationality Act of 1952, as amended, after determining that Demerol is a "salt derivative or preparation of isonipecaine or any addiction-forming opiate"); *Matter of M-*, 9 I. & N. Dec. 181 (B.I.A. 1961) (holding that a conviction under the Opium Control Act of 1942 for the growing of "opium poppy" without a license constitutes a violation of "any law or regulation governing or controlling the production of opium, any salt derivative or preparation of opium or any addiction-forming or addiction sustaining opiate" under the Immigration Act of 1952 by determining that the statute of conviction was limited to the cultivation of opium itself rather than any noncontrolled food product (citation

omitted)); *see also Matter of Abreu-Semino*, 12 I. & N. Dec. 775 (B.I.A. 1968) (noting that LSD, as a depressant and stimulant drug, is not a narcotic and thus would not be a deportable offense under the relevant controlled substance ground at the time).

In other cases, the statute or record of conviction did not specify the type of drug at issue, in which case the B.I.A. had to assess whether or not the types of drugs listed in the statute of conviction were all included within the type of drugs listed in the relevant immigration provision. For example, in *Matter of Fong*, the B.I.A. held that a conviction for unlawful use of a drug defined under Pennsylvania law is a conviction relating to illicit possession of a narcotic drug or marijuana "since *every* drug enumerated in the Pennsylvania law is found to be a narcotic drug or marijuana within the meaning of section 241(a)(11) of the Immigration and Nationality Act." 10 I. & N. Dec. 616, 619 (B.I.A. 1964) (emphasis added). Applying the same categorical statutory inquiry to a California law in *Matter of Paulus*, the B.I.A. concluded that a conviction for offering to sell a controlled substance under California law was not necessarily a deportable offense because California proscribes the offer to sell peyote, which was not (at the time) proscribed under federal law. 11 I. & N. Dec. 274, 275 (B.I.A. 1965). In such an instance where the state list of controlled substances did not match the federal list, the B.I.A. held that the government had not met its burden of establishing deportability. *Id.* at 276 ("Since the conviction here could have been for an offer to sell a

substance which though a narcotic under California law is not a narcotic drug under federal laws, we cannot say that the Service has borne its burden of establishing that respondent has been convicted of a violation of a law relating to narcotic drugs.").

Not every noncitizen challenges his or her removal order on the basis of these types of alleged mismatches. Where a challenge is raised, however, for decades the B.I.A. has consistently applied the categorical approach with respect to analyzing the inquiry.

D. Immigration officials have considered the term "relating to" when assessing whether an individual was convicted of the relevant type of drug activity, not as a basis for ignoring the requirement that an individual be convicted of the relevant type of substance.

Inquiries involving the phrase "relating to" in the immigration drug statute have historically arisen when noncitizens have challenged whether they were convicted of the type of the drug activity – not the type of substance – that would render them deportable under the statute. When these challenges have arisen, immigration officials have examined the minimum conduct required by the statute – rather than underlying facts – to determine whether that conduct is the type of conduct to which Congress intended to tie adverse immigration consequences.

For example, the B.I.A. has had to determine whether offenses like conspiracy, attempt, misprision of a felony, or firearms possession during the commission of a felony – each where underlying acts involved drugs – were "relating to" a violation of trafficking or possession laws under the relevant law. The B.I.A. came to differing conclusions based on whether the conviction required involvement in the prohibited drug activity. *Compare Matter of Carrillo*, 16 I. & N. Dec. 625 (B.I.A. 1978) (conviction for unlawful carrying of a firearm during commission of a felony, illicit possession of heroin, is not a violation of a law "relating to" illicit possession of a narcotic drug because it is a separate offense than the underlying felony) *and Matter of Velasco*, 16 I. & N. Dec. 281 (B.I.A. 1977) (conviction of misprision of a felony, to wit, possession of marijuana with intent to distribute, is not a conviction of a law "relating to" the illicit possession of or traffic in narcotic drugs or marijuana because such a conviction does not necessarily involve the commission of the offense that was concealed) *with Matter of Bronsztejn*, 15 I. & N. Dec. 281 (B.I.A. 1975) (holding that conviction for attempted possession of marijuana is a violation of law "relating to" possession of marijuana because the substantive offense that was attempted involved marijuana possession); *Matter of N-*, 6 I. & N. Dec. 557, 561 (B.I.A., A.G. 1955) (holding that a drug conspiracy conviction is a violation of a law "relating to" the illicit trafficking of narcotics under the Immigration and Nationality Act of 1952 because the substantive offense that was the object of the conspiracy involved trafficking).

Similarly, the B.I.A. has assessed whether drug possession and drug use offenses triggered deportability by "relating to" the types of drug activity listed under the relevant immigration provisions at the time. The B.I.A. strictly construed statutory references to possession to exclude convictions that did not necessarily involve the type of possession contemplated by Congress. *See, e.g.*, *Matter of Sum*, 13 I. & N. Dec. 569 (B.I.A. 1970) (holding that state conviction for unlawful "use" of narcotics is not a violation of a law "relating to" illicit possession of narcotics because the individual does not have control of or the ability to traffic in the substance once it is in his or her system (*overruling in part Matter of H-U-*, 7 I. & N. Dec. 533 (B.I.A. 1957) and *Matter of Fong*, 10 I. & N. Dec. 616 (B.I.A. 1964), *superseded by statute as explained in Matter of Hernandez-Ponce*, 19 I. & N. Dec. 613 (B.I.A. 1988)); *Matter of R-M-*, 8 I. & N. Dec. 397 (B.I.A. 1959) (holding that a conviction for simple possession of marijuana is not a deportable offense under the Immigration and Nationality Act of 1952 because Congress (at the time) tethered deportation consequences only to convictions relating to possession specifically for the purpose of manufacturing or producing marijuana, nor for personal use).

The B.I.A. has also applied the term "relating to" to determine whether state statutes aimed broadly at regulating the drug trade were sufficiently related to illicit possession or trafficking for purposes of the relevant deportation provisions at the time. The B.I.A. came to differing conclusions based on whether

the state statute of conviction necessarily entailed engagement in drug possession or trafficking. *Compare Matter of Schunck*, 14 I. & N. Dec. 101, 102-103 & n.1 (B.I.A. 1972) (holding a state conviction for "visit[ing] or be[ing] in any room where any narcotics are being unlawfully smoked or used with knowledge that such activities are occurring" is not a conviction of a law "relating to" the illicit possession or trafficking of narcotics or marijuana since a conviction under the state statute "does not ipso facto establish that he is engaged in the illicit possession of or traffic in narcotic drugs or marijuana" (internal quotation marks omitted)) *with Matter of Martinez Gomez*, 14 I. & N. Dec. 104, 105 (B.I.A. 1972) (holding that a state conviction for "maintain[ing] any place for the purpose of unlawfully selling, giving away or using any narcotic," is a conviction of a law relating to "illicit traffic in narcotic drugs or marijuana" within the meaning of the statute because the place must be maintained for the unlawful disposal of narcotics).

None of these cases involved a challenge to the type of controlled substance involved, and prior to its 2009 decision in *Matter of Martinez Espinoza*, 25 I. & N. Dec. 118 (B.I.A. 2009), the B.I.A. did not use the term "relating to" to resolve a challenge involving the type of controlled substance by broadening or ignoring the list of substances proscribed in the relevant immigration statute. *See* Point II, *infra* (addressing fallacies in Respondent's arguments).

II. RESPONDENT'S POSITION CONFLICTS WITH THE PROPER APPLICATION OF THE LONGSTANDING CATEGORICAL APPROACH IN THE DRUG CONTEXT.

Petitioner Moones Mellouli was convicted under a Kansas statute that prohibits the possession of drug paraphernalia to "store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body." Kan. Stat. Ann. § 21-5709(b)(2). The Kansas statute defines "controlled substance" as any drug, substance or immediate precursor included on its own set of schedules. Kan. Stat. Ann. § 21-5701. At the time of Mr. Mellouli's conviction, the Kansas schedule of controlled substances included at least nine substances that were not defined in the federal schedule, 21 U.S.C. § 802. *See* Kan. Stat. Ann. § 21-5701; Pet'r Br. at 3. The Kansas drug paraphernalia statute thus did not refer to the specific type of substance underlying Mr. Mellouli's conviction, nor did any reference to the substance appear in the record of his conviction. Pet'r Br. at 5-6.

Under the longstanding categorical approach described in Point I, *supra*, Mr. Mellouli has not been convicted of a violation of a law "relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))." 8 U.S.C. § 1227(a)(2)(B)(i). Neither the statute nor record of conviction establishes that he was necessarily convicted of the type of substance defined in 21 U.S.C. § 802.

Rather than faithfully adhere to this straightforward and longstanding inquiry, Respondent argues that immigration officials may simply ignore the statutory requirement that a noncitizen must be "convicted" of a violation of a law related to a controlled substance "as defined in section 802 of title 21." *See* Resp. Br. in Opp. to Cert. ("BIO") at 7-10 (explaining Respondent's position). Relying on a recent B.I.A. decision, *Matter of Martinez Espinoza*, 25 I. & N. Dec. 118 (B.I.A. 2009), both the U.S. Court of Appeals for the Eighth Circuit and the B.I.A. held that because Mr. Mellouli was convicted under a drug paraphernalia statute that involves "the drug trade in general," it was a violation of law "relating to" a controlled substance offense, despite not necessarily involving a controlled substance as defined in 21 U.S.C. § 802. *Mellouli v. Holder*, 719 F.3d 995, 1000 (8th Cir. 2013). The Eighth Circuit further held the lack of any reference to the type of substance in the Kansas statute and record of conviction was irrelevant to the inquiry because there is "little more than a 'theoretical possibility' that a conviction for a controlled substance offense under Kansas law will not involve a controlled substance as defined in 21 U.S.C. § 802. *Id.* at 997, 1000 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). Finally, while this is not an issue in Mr. Mellouli's deportability case, Respondent has argued that the categorical approach applies differently in cases involving inadmissibility and relief from removal where the burden of proof is on the noncitizen. *See, e.g.*, *Madrigal-Barcenas v. Holder*, No. 13-697, Resp. Br. in Opp. to Cert. at 7-9

(discussing petitioner's failure to meet his burden of proof in drug paraphernalia context); *Matter of Martinez Espinoza,* 25 I. & N. Dec. at 121 (discussing burden of proof in inadmissibility context as another reason not to require that type of substance be established by a drug paraphernalia conviction).

As this section of the brief explains, none of these points provides a basis for departing from the longstanding categorical approach in this case or similar cases. First, prior to the B.I.A.'s 2009 decision in *Matter of Martinez Espinoza*, there was no "drug trade" exception to the requirement that a conviction must establish the specified type of substance required under federal law (which is, under the present statute, a substance defined in 21 U.S.C. § 802). *See* Point II.A, *infra.* Second, Respondent's reliance on the analysis in *Duenas-Alvarez* is flawed. One need not use "legal imagination" to determine whether Kansas criminalizes a substance not on the federal schedule – the statute expressly includes non-federally-controlled substances. *See* Point II.B, *infra.* Finally, this Court should also reject any contention that the categorical approach – a legal inquiry – varies based on burden of proof. *See* Point III.C.

A. There is no "drug trade" exception to the categorical approach when assessing drug convictions.

In *Matter of Martinez Espinoza*, a noncitizen convicted of a Minnesota drug paraphernalia offense challenged his removability on several grounds, including the mismatch between the types of substances proscribed under Minnesota law and those proscribed under 21 U.S.C. § 802. 25 I. & N. Dec. 118, 121-22 (B.I.A. 2009). After stating that the noncitizen's argument had "little relevance to his own case" because the criminal complaint charged him with possessing a marijuana pipe, the B.I.A. made additional observations in rejecting his claim. *Id.* In particular, the B.I.A. noted that "we have long drawn a distinction between crimes involving the possession or distribution of a particular drug and those involving other conduct associated with the drug trade in general." *Id.* For an offense involving "the drug trade in general," the B.I.A. reasoned, there was no need for the statute or record of conviction to establish that the type of controlled substance serving as the basis of the conviction is one of the drugs defined under 21 U.S.C. § 802. *Id.* In doing so, the B.I.A. distinguished the case from *Matter of Paulus*, which dealt with an offer to sell drugs and required that the state statute proscribe the types of controlled substance punishable under federal law. *Id.*

Nowhere in the statute is there any mention of a "drug trade" exception to the "as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)"

requirement. 8 U.S.C. § 1227(a)(2)(B)(i). Nor did the B.I.A. provide a statutory basis for its distinction between "drug trade in general" versus "possession or distribution" crimes, or explain why possession of drug paraphernalia would fit into a "drug trade" exception while the offer to sell drugs – at issue in *Matter of Paulus* – does not. If anything, Congress eliminated some of its prior distinctions between types of drug activity when it replaced its growing lists of types of drug activities with the language in the current statute, which punishes "any violation" relating to a controlled substance defined under 21 U.S.C. § 802.

Nor does the B.I.A. decision in *Matter of Martinez Espinoza* draw from its own precedent. Indeed, the B.I.A. cited only one case for its proposition that "we have long drawn a distinction between crimes involving the possession or distribution of a particular drug and those involving other conduct associated with the drug trade in general." *Id.* at 121-22 (citing *Matter of Martinez Gomez*, 14 I. & N. Dec. 104 (B.I.A. 1972)). Yet that one case, *Matter of Martinez Gomez*, did not involve any argument about a mismatch between the types of substances proscribed under state and federal law.

In *Matter of Martinez Gomez*, immigration officials charged a noncitizen with deportability based on a California conviction for "maintain[ing] any place for the purpose of unlawfully selling, giving away or using any narcotic." 14 I. & N. Dec. at 104 n.1. The question was whether the statute proscribed the type

of drug activity that would render it "relating to illicit traffic in narcotic drugs or marijuana" within the meaning of the Immigration and Nationality Act. *Id.* at 105. There is no reference to any argument (either raised by the noncitizen, who was apparently pro se, or considered sua sponte by the B.I.A.) regarding whether the state statute's definition of narcotics was broader than the federal definition. Nor did the B.I.A. state that such an inquiry would be irrelevant to deportability because of the term "relating to" or because the conviction involved "the drug trade in general."

Rather than establish a "drug trade" exception, the longstanding precedent prior to *Matter of Martinez Espinoza* establishes a careful adherence to the federal requirement that a person's conviction involve a particular type of substance. As noted in Point I.C, *supra*, this requirement has applied to all types of drug offenses, including offenses involving possession, sale, and other drug activity. Nothing in the statutory language or precedent suggest the existence of two different tests, one of which gives meaning to statutory language defining controlled substances by reference to 21 U.S.C. § 802, and one of which ignores that language.

B. No "legal imagination" is required here.

In addition to adopting the B.I.A.'s "drug trade" exception, the Eighth Circuit also invoked *Duenas-Alvarez* to suggest that it need not determine that Mr. Mellouli was convicted of a substance defined on the

federal drug schedule. *Mellouli*, 719 F.3d at 997, 1000 (excusing mismatch between state and federal schedules by noting there is "little more than a 'theoretical possibility' that a conviction for a controlled substance offense under Kansas law will not involve a controlled substance as defined in 21 U.S.C. § 802." (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007), which holds that a party may not use "legal imagination" in interpreting a state statute of conviction).

The Eighth Circuit's erroneous invocation of *Duenas-Alvarez* perverts its role as a tool of the categorical approach. *See* Doug Keller, *Causing Mischief for Taylor's Categorical Approach: Applying "Legal Imagination" to* Duenas-Alvarez, 18 GEO. MASON L. REV. 625, 637-67 (2011) (describing how lower courts have misapplied *Duenas-Alvarez*). Under the categorical approach, immigration officials must assess the minimum conduct proscribed under the statute of conviction. In many cases, the minimum conduct will be clear from the statutory language and case law interpreting the terms. In some cases, however, a party might resort to additional interpretive tools to argue that a statute does or does not cover removable or nonremovable conduct. *Duenas-Alvarez* merely holds a party may not use "legal imagination" to advance a novel interpretation that the statutory language is broader or narrower than the text and case law might otherwise establish. *See Moncrieffe*, 133 S. Ct. at 1684-85 (explaining that the categorical approach's "focus on the minimum conduct

criminalized by the state statute is not an invitation to apply 'legal imagination' to the state offense" (quoting *Duenas-Alvarez*, 549 U.S. at 193); *Duenas-Alvarez*, 549 U.S. at 193 (applying the categorical approach to petitioner's theft offense and rejecting petitioner's attempt to advance a novel theory of accessory liability as a means for going beyond the minimum conduct proscribed by the statute); *see also* Keller, 18 GEO. MASON L. REV. at 644-58 (arguing that the *Duenas-Alvarez* test is properly applied to novel interpretations of the law as a tool of the categorical approach, not as a basis to ignore statutory requirements).

Thus, *Duenas-Alvarez* is not an invitation to ignore the focus of the categorical approach – to determine what is necessarily required by the statute of conviction. Indeed, in most cases, the statutory language (and, where relevant, binding court interpretations) will be the beginning and the end of the inquiry. *See Ramos v. U.S. Att'y Gen.*, 709 F.3d 1066, 1071-72 (11th Cir. 2013) (finding no concern under *Duenas-Alvarez* when "the statutory language itself, rather than 'the application of legal imagination' to that language, creates the 'realistic probability' that a state would apply the statute to conduct beyond the generic definition"); *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) ("Where a state statute explicitly defines a crime more broadly than the generic definition, no 'legal imagination' is required to hold that a realistic probability exists. The state statute's greater breadth is evident from its text.");

see also United States v. Aparicio-Soria, 740 F.3d 152, 158 (4th Cir. 2014) (en banc) ("We do not need to hypothesize about whether there is a 'realistic probability' that Maryland prosecutors will charge defendants engaged in non-violent offensive physical contact with resisting arrest; we know that they can because the state's highest court has said so.").

Here, Mr. Mellouli is not relying on legal imagination to argue that the Kansas statute is broader than federal requirements. One need look no further than the definitions of controlled substances in Kansas law to see that it covers substances not defined in 21 U.S.C. § 802. Respondent cannot say the statutes are 'close enough' when the Kansas statute is plainly broader.

C. The categorical approach does not vary based on burden of proof.

Although this case arises in the context of deportability, drug convictions may also give rise to charges of inadmissibility or as a possible bar to relief from removal. Notably, the B.I.A. in *Matter of Martinez Espinoza* suggested that the burden of proof on the noncitizen in these contexts is further reason to ignore the categorical approach for drug paraphernalia convictions. 25 I. & N. Dec. 118, 121 (B.I.A. 2009) (addressing issue in context of inadmissibility and distinguishing *Matter of Paulus* as deportability case); *see also Madrigal-Barcenas v. Holder*, No. 13-697, Resp. Br. in Opp. to Cert. at 7-9 (discussing

petitioner's failure to meet his burden of proof in the cancellation of removal context). Because this rationale is plainly wrong, *amici* note here that any rule adopted in this case should be consistent across contexts.

Throughout its history, the categorical approach has not varied based on the burden of proof. While the party carrying the burden of proof varies across contexts, *compare* 8 U.S.C. § 1229a(c)(3)(A) (government bears burden to prove basis for deportability), *with* 8 U.S.C. § 1229a(c)(2)(A) (noncitizen bears burden to prove admissibility) *and* 8 U.S.C. § 1229a(c)(4)(A) (noncitizen bears burden to prove eligibility for relief from removal), the application of the categorical approach is a legal, rather than factual, inquiry. While it sometimes calls for reference to the record of conviction, this is solely for the purpose of determining which offense within a divisible statute gave rise to the noncitizen's conviction. *See* Point I, *infra*. The outcome therefore does not turn on burdens of proof; either the conviction is for an offense that is a controlled substance offense or it is not. *See Moncrieffe*, 133 S. Ct. at 1685 n.4 (noting that the drug aggravated felony issue presents itself both in the context of deportability and relief from removal and stating that the "[categorical] analysis is the same in both contexts"). Thus, where the statute and record of conviction leave the answer ambiguous, the conviction is not a controlled substance offense. *See id.* at 1687 (noting that Mr. Moncrieffe's offense might meet the aggravated felony definition or not,

and that "[a]mbiguity on this point means that the conviction did not 'necessarily' involve facts that correspond to an offense" under the definition of illicit trafficking aggravated felony); *Martinez v. Mukasey*, 551 F.3d 113, 122 (2d Cir. 2008) ("Although an alien must show that he has not been convicted of an aggravated felony, he can do so merely by showing that he has not been *convicted* of such a crime. And under the categorical approach, a showing that the minimum conduct for which he was convicted was not an aggravated felony suffices to do this.").

Thus any emphasis of the burden of proof in the categorical approach context is a red herring. Indeed, historically, courts have long applied the categorical approach to contexts where the noncitizen bears the burden of proof. For example, the Second Circuit's landmark opinion in *Mylius* arose out of a noncitizen's challenge to his exclusion from the United States – a context in which the noncitizen generally bears the burden of proof. *Mylius*, 210 F. at 863. The federal immigration agency has adopted this same stance in subsequent exclusion cases, irrespective of the placement of the burden on the noncitizen. *See, e.g.*, *Attorney General Op.*, 37 Op. Att'y Gen. 293, 294-95 (1933); *Matter of T-*, 2 I. & N. Dec. 22, 22 (B.I.A. 1944); *Matter of P-*, 3 I. & N. Dec. 56 (B.I.A. 1947).

Moreover, the consistent application of the categorical approach regardless of burden preserves uniformity and predictability across the various contexts in which drug conviction-based immigration consequences may arise. *See* Das, 86 N.Y.U. L. Rev.

at 1733-38 (discussing how the categorical approach serves important uniformity and predictability rationales). A drug conviction may come up as a ground of deportability, a ground of inadmissibility, or bar to discretionary relief. *See, e.g.*, 8 U.S.C. § 1227(a)(2)(B)(i) (deportability ground); 8 U.S.C. § 1229b(b)(1)(C) (bar to nonpermanent resident cancellation of removal); 8 U.S.C. § 1182(a)(2)(A)(i)(II) (inadmissibility ground); 8 U.S.C. § 1182(h) (bar to inadmissibility waiver). If the categorical approach were cast aside and the outcome of an inquiry into what a noncitizen was "convicted of" varied based on burden of proof, the government could control the outcome based on its charging decisions. This would impose a "layer of arbitrariness" to immigration proceedings, for a noncitizen's relief eligibility would "hang[] on the fortuity of an individual official's decision" to specify charges at the removal stage. *See Judulang v. Holder*, ___ U.S. ___, 132 S. Ct. 476, 486 (2011).

Congress's continued choice to predicate various immigration consequences on whether a noncitizen has been "convicted" of a controlled substance offense in the deportability, inadmissibility, and relief eligibility contexts – regardless of burden – demonstrates the continued applicability of the categorical approach in all contexts. *See Fajardo v. Att'y Gen.*, 659 F.3d 1303, 1309 (11th Cir. 2011) ("Had there been congressional disagreement with the courts' interpretation of the word 'conviction,' Congress could easily have removed the term 'convicted' from the INA during any one of the *forty times* the statute has been

amended since 1952." (citing 8 U.S.C. § 1182 (historical notes)) (emphasis added)); *Matter of Velazquez-Herrera*, 24 I. & N. Dec. 503 (B.I.A. 2008) ("[W]e must presume that Congress was familiar with [the history of the categorical approach] when it made [a ground of removal] depend on a 'conviction.'"); *see also* Point I.A-B, *supra*. As long as an immigration adjudicator is tasked with determining whether an individual has been "convicted of" any violation of law "relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))," that immigration adjudicator must apply the categorical approach to determine whether the individual was necessarily convicted of a controlled substance offense where the substance is defined under 21 U.S.C. § 802. The outcome of this legal inquiry should not turn on burdens of proof.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to uphold the application of the longstanding categorical approach to determinations of whether a person

has been convicted of a violation of law relating to a controlled substance as defined under 21 U.S.C. § 802.

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AMICUS CURIAE BRIEF

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RECORD AND BRIEFS

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MOONES MELLOULI,

Petitioner,

v.

ERIC H. HOLDER, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IMMIGRANT DEFENSE PROJECT, AND NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD AS AMICI CURIAE SUPPORTING PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. SIMPLE POSSESSION OF PARAPHERNALIA OFFENSES ARE LOW-LEVEL CRIMES THAT, AS CHARGED AND PLEADED, OFTEN HAVE NO CONNECTION TO A FEDERALLY-SCHEDULED CONTROLLED SUBSTANCE 5

A. Congress Did Not Intend For Convictions For Low-Level State Paraphernalia Offenses To Categorically Trigger Removal 7

1. Unlike the federal paraphernalia statute, state paraphernalia statutes are broadly inclusive and uniformly low-level 7

2. A rule that categorically deems state paraphernalia offenses to relate to federally controlled substances impermissibly allows States to define and expand the bases for removal unilaterally 15

B. The Circumstances Under Which PDP Offenses Are Charged And Pleaded Only Exacerbates The Untoward Effects Of The Eighth Circuit's Rule 18

TABLE OF CONTENTS—Continued

Page

II. THE EIGHTH CIRCUIT'S RULE SOWS UNCERTAINTY AND UNFAIRNESS FOR NONCITIZENS AND CRIMINAL DEFENSE LAWYERS AND UNDULY BURDENS THE COURT SYSTEM 22

A. The Eighth Circuit's Rule Severely Complicates Defense Attorneys' Constitutional Duty To Provide Correct Advice Regarding The Immigration Consequences Of A Criminal Conviction 23

B. The Eighth Circuit's Rule Places Defense Attorneys In An Intractable Situation And Burdens The Court System As A Whole 25

C. The Eighth Circuit's Rule Also Entails Significant Unfairness For Noncitizens, Whether Or Not Represented By Counsel 30

CONCLUSION 32

TABLE OF AUTHORITIES

CASES

Page(s)

Alabama v. *Shelton*, 535 U.S. 654 (2002) 20

Alleyne v. *United States*, 133 S. Ct. 2151 (2013) 1

Arizona v. *United States*, 132 S. Ct. 2492 (2012) 14, 18

Bustamante-Barrera v. *Gonzales*, 447 F.3d 388 (5th Cir. 2006) 4

Carachuri-Rosendo v. *Holder*, 560 U.S. 563 (2010) 2, 13

Commonwealth v. *Torres*, 617 A.2d 812 (Pa. Super. Ct. 1992) 9

Demore v. *Kim*, 538 U.S. 510 (2003) 31

Desai v. *Mukasey*, 520 F.3d 762 (7th Cir. 2008) 17, 26

Descamps v. *United States*, 133 S. Ct. 2276 (2013) 31

Fernandez v. *California*, 134 S. Ct. 1126 (2014) 1

Fleming v. *State*, 972 So. 2d 831 (Ala. Crim. App. 2006) 20

Fong Haw Tan v. *Phelan*, 333 U.S. 6 (1948) 3

Huerta-Flores v. *Holder*, __ F. App'x __, 2014 WL 3361435 (9th Cir. July 10, 2014) 16

In re Standard Jury Instructions In Criminal Cases, 969 So. 2d 245 (Fla. 2007) 28

INS v. *St. Cyr*, 533 U.S. 289 (2001) 1, 2

Kawashima v. *Holder*, 132 S. Ct. 1166 (2012) 4

Lafler v. *Cooper*, 132 S. Ct. 1376 (2012) 24, 25

TABLE OF AUTHORITIES—Continued

Page(s)

Leocal v. *Ashcroft*, 543 U.S. 1 (2004) 2

Lopez v. *Gonzales*, 549 U.S. 47 (2006) 2, 13, 18

Maloney v. *State*, 684 N.E.2d 488 (Ind. 1997) 20

Matter of Joseph, 22 I. & N. Dec. 799 (BIA 1999) 32

Matter of Martinez Espinoza, 25 I. & N. Dec. 118 (BIA 2009) 30

Matter of Paulus, 11 I. & N. Dec. 274 (BIA 1965) 30

Mielewczyk v. *Holder*, 575 F.3d 992 (9th Cir. 2009) 16

Missouri v. *Frye*, 132 S. Ct. 1399 (2012) 1, 23, 24

Moncrieffe v. *Holder*, 133 S. Ct. 1678 (2013) 4, 14, 31

Navarette v. *California*, 134 S. Ct. 1683 (2014) 1

Oregon v. *Ice*, 555 U.S. 160 (2009) 30

Padilla v. *Kentucky*, 559 U.S. 356 (2010) 2, 22, 24, 25, 30

Ragasa v. *Holder*, 752 F.3d 1173 (9th Cir. 2014) 16

Rojas v. *Attorney General*, 728 F.3d 203 (3d Cir. 2013) 16, 17, 18, 26, 29

Ruiz-Vidal v. *Gonzales*, 473 F.3d 1072 (9th Cir. 2007), *abrogated on other grounds as recognized in Cardozo-Arias* v. *Holder*, 495 F. App'x 790 (9th Cir. 2010) 16

State v. *Christian*, 795 N.W.2d 702 (N.D. 2011) 9

State v. *Lee*, 856 P.2d 1246 (Haw. 1993) 10

TABLE OF AUTHORITIES—Continued

Page(s)

State v. *McAllister*, 731 S.E.2d 276 (N.C. Ct. App. 2012) 9

Toll v. *Moreno*, 458 U.S. 1 (1982) 18

Town Tobacconist v. *Kimmelman*, 462 A.2d 573 (N.J. 1983) 9, 10

United States v. *Brooks*, No. 07-705-1, 2008 WL 4601924 (E.D. Pa. Oct. 15, 2008) 9

United States v. *Grover*, 486 F. Supp. 2d 868 (N.D. Iowa 2007) 10

United States v. *Lopez*, 536 F. Supp. 2d 218 (D. Conn. 2008) 16

United States v. *Nelson*, 166 F. Supp. 2d 1091 (E.D. Va. 2001) 11

United States v. *Pollard*, 389 F.3d 101 (4th Cir. 2004) 20

Vartelas v. *Holder*, 132 S. Ct. 1479 (2012) 2

CONSTITUTIONS, STATUTES, AND RULES

U.S. Const. art. I, § 8, cl. 4 4

8 U.S.C.
§ 1226(c) 31
§ 1227 ..... 13, 17, 18, 23, 30
§ 1227(a)(2)(B) 8, 31
§ 1227(a)(2)(B)(i) 2, 4, 8, 12, 25, 26

21 U.S.C. § 863 7

Model Drug Paraphernalia Act art. 1 8

Uniform Controlled Substances Act 15, 16, 18, 31

TABLE OF AUTHORITIES—Continued

Page(s)

Cal. Health & Safety Code § 11364.7 11

Colo. Rev. Stat. § 18-18-428 (1992) 12

Fla. Stat.
§ 893.145(12) 10
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INTEREST OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL"), a non-profit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. Founded in 1958, NACDL has a nationwide membership of approximately 10,000 and up to 40,000 including affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is dedicated to advancing the proper, efficient, and just administration of justice, including the administration of criminal law.

NACDL files numerous amicus curiae briefs each year in this Court and other courts. This Court has often cited NACDL amicus briefs that address the everyday workings of the criminal justice system and the implications of the Court's decisions in criminal justice and immigration cases. *See, e.g., Navarette* v. *California*, 134 S. Ct. 1683, 1694 (2014) (Scalia, J., dissenting); *Fernandez* v. *California*, 134 S. Ct. 1126, 1142 & n.4 (2014) (Ginsburg, J., dissenting); *Alleyne* v. *United States*, 133 S. Ct. 2151, 2164 (2013) (Sotomayor, J., concurring); *Missouri* v. *Frye*, 132 S. Ct. 1399, 1402 (2012); *INS* v. *St. Cyr*, 533 U.S. 289, 322-323 (2001).

The Immigrant Defense Project ("IDP") is a not-for-profit legal resource and training center that provides criminal defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications, and

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk.

training on issues involving the interplay between criminal and immigration law. IDP is dedicated to promoting fundamental fairness for immigrants accused of crimes, and therefore has a keen interest in ensuring the correct interpretation of laws that may affect the rights of immigrants at risk of detention and deportation based on past criminal charges. IDP has submitted amicus curiae briefs in many of this Court's key cases involving the interplay between criminal and immigration law. *See, e.g.*, *Vartelas* v. *Holder*, 132 S. Ct. 1479 (2012); *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563 (2010); *Padilla* v. *Kentucky*, 559 U.S. 356 (2010); *Lopez* v. *Gonzales*, 549 U.S. 47 (2006); *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004); *St. Cyr*, 533 U.S. at 322-323 (citing IDP brief).

The National Immigration Project of the National Lawyers Guild ("NIP") is a non-profit membership organization of attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and secure the fair administration of the immigration and nationality laws. For thirty years, the NIP has provided legal training to the bar and the bench on immigration consequences of criminal conduct and is the author of *Immigration Law and Crimes* and three other treatises. The NIP has participated as amicus curiae in several significant immigration-related cases before this Court. *See, e.g.*, *Vartelas*, 132 S. Ct. 1479; *Carachuri-Rosendo*, 560 U.S. 563; *Padilla*, 559 U.S. 356.

This case raises an important issue at the intersection of criminal and immigration law: whether a conviction under state law for simple possession of drug paraphernalia (here, a sock) renders a lawful permanent resident removable under 8 U.S.C. § 1227(a)(2)(B)(i). The decision below has significant implications for criminal defendants who are immigrants to the United States; their lawyers, who are obligated under this

Court's case law to apprise their clients of the immigration consequences of any criminal convictions; and the criminal justice system more broadly.

INTRODUCTION AND SUMMARY OF ARGUMENT

Moones Mellouli, a lawful permanent resident, was deemed removable from the United States for a misdemeanor state conviction for possession of drug paraphernalia—namely, a sock that allegedly contained pills whose specific identity was not established. His conduct was not a crime under federal law. Indeed, Mellouli's offense of conviction would not constitute a crime in many States; in those where it would, it is generally treated as a low-level misdemeanor with limited if any criminal consequences. Yet under the Eighth Circuit's reading of the federal immigration laws, Mellouli is subject to the "drastic measure" of deportation. *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948). That rule contravenes Congress' intent by predicating removability on a low-level offense that does not match the criminal removal ground in question, and it defeats the uniformity of our Nation's immigration laws by subjecting a lawful permanent resident to different immigration consequences depending upon where his state conviction was entered. What is more, the rule makes it decidedly more difficult for criminal defendants to navigate our Nation's overlapping criminal and immigration systems and for the other participants in that system—defense lawyers, prosecutors, and courts—to discharge their duties effectively.

This case implicates three critical principles. First, Congress' intent is the touchstone in determining whether a state criminal conviction suffices to establish removability under federal law, because "Congress' aim in drafting [the federal immigration laws] was to de-

termine which crimes are sufficiently serious to warrant the 'drastic measure' of deportation, and which are not." *Kawashima* v. *Holder*, 132 S. Ct. 1166, 1179 (2012) (Ginsburg, J., dissenting). Second, as the Constitution's Naturalization Clause makes plain, the Founders placed a premium on "uniform" immigration laws. *See* U.S. Const. art. I, § 8, cl. 4. Rules that undermine the "overarching constitutional interest in uniformity of federal immigration and naturalization law" are disfavored. *Bustamante-Barrera* v. *Gonzales*, 447 F.3d 388, 399 (5th Cir. 2006). Third, the administration of a just immigration system depends on the ability of noncitizens to understand what acts or omissions may give rise to their removal from the United States. Rules that are enforced arbitrarily, or contrary to their plain terms, undermine this Court's directive that immigrants "be treated consistently, and thus predictably, under federal law." *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1693 n.11 (2013).

Under the Eighth Circuit's reading of 8 U.S.C. § 1227(a)(2)(B)(i), a state conviction for possession of drug paraphernalia is considered to be "relate[d] to a controlled substance" for immigration purposes, even if there is no demonstrated connection to an actual federally controlled substance. *See* Pet. App. 10 (internal quotation marks omitted). That rule undermines each of the principles just described, and threatens the careful balance this Court has drawn between state criminal law and the federal immigration law.

In addition, as a practical matter, the court of appeals' rule will have at the very least confounding—and potentially disastrous—effects on the administration of criminal justice in overburdened state courts. Charges for possession of drug paraphernalia are treated consistently with their low-level, nuisance status—they

are hurriedly processed through the court system with a minimum of protection for defendants. The dire immigration consequences that may follow from these convictions raise the stakes for criminal defendants, but do not translate into increased time or attention from the criminal courts. That leaves criminal defense attorneys and their clients in the untenable position of having to speculate about the consequences of low-level crimes that are ordinarily resolved in contexts that do not provide the opportunity for, much less require the development of, a record identifying what controlled substance was supposedly involved.

The rule also limits the ability of prosecutors, defense attorneys, and uncounseled noncitizens alike to negotiate plea deals for low-level crimes that are acceptable to all parties. This accordingly increases the chances that noncitizens accused of drug-paraphernalia-related conduct will be advised to reject plea bargains and to insist on trials that place a strain on the already overburdened court system. More generally, the rule is inconsistent with this Court's recent decisions recognizing the centrality of plea bargaining to the modern administration of criminal justice and the Sixth Amendment implications of the collateral consequences of criminal pleas.

ARGUMENT

I. Simple Possession Of Paraphernalia Offenses Are Low-Level Crimes That, As Charged And Pleaded, Often Have No Connection To A Federally-Scheduled Controlled Substance

Mellouli was convicted under Kansas law prohibiting "possession of drug paraphernalia" (PDP)—to wit, "a sock" used to "store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a

controlled substance." Pet. App. 6 n.2 (internal quotation marks omitted). That is a minor offense under Kansas law, as it is under the law of most States, where it is usually prosecuted as a common misdemeanor. In practice, such low-level PDP charges often result in a quick plea with minimal court process, no exploration or exposition of the particular substance at issue (federally scheduled or otherwise), and little if any jail time. PDP statutes are also very broad, as this case evidences: they reach virtually any item that can be said to bear even the most glancing or speculative relation to controlled substances. And PDP statutes vary materially from State to State, not only in the array of paraphernalia they address, but also in the list of substances controlled under state law to which the paraphernalia may relate and the mens rea required for a conviction.

These defining features of PDP offenses make them uniquely problematic from the vantage point of immigration law. First, the statutes' exceptional breadth, coupled with their uniformly low-level status, means that countless individuals stand convicted of truly minor crimes; to the extent federal immigration law can be read to predicate removability categorically on such convictions, Congress' intent in reserving the drastic measure of deportation only for controlled-substance crimes truly relating to federally controlled substances is thwarted. Second, the statutes vary materially from State to State, not only as to the affected paraphernalia and its proscribed uses (*i.e.*, simple possession or something more), but also as to the schedule of controlled substances to which the paraphernalia must relate. To the extent States are permitted to expand the breadth of federal immigration law unilaterally—whether by enlarging the scope of their PDP statutes or scheduling controlled substances that are not

also federally scheduled—the abiding national interest in uniform immigration laws is undermined.

These concerns are only heightened by the manner in which PDP offenses are resolved in state courts. Given their traditionally low stakes, PDP offenses are charged and pleaded to in the most informal of settings, by often uncounseled criminal defendants. This expeditious administration of criminal justice provides no reason or opportunity for defendants to make the record that the Eighth Circuit's rule would require in order to challenge the unanticipated immigration consequences of an uncounseled plea.

A. Congress Did Not Intend For Convictions For Low-Level State Paraphernalia Offenses To Categorically Trigger Removal

1. Unlike the federal paraphernalia statute, state paraphernalia statutes are broadly inclusive and uniformly low-level

The federal law regulating drug paraphernalia is substantially narrower and more severe than the corresponding patchwork of State drug paraphernalia statues. The federal statute criminalizes as a felony only the sale of or commerce in paraphernalia; possession is not criminalized at all. *See* 21 U.S.C. § 863(a)-(b). In contrast, States may punish possession of drug paraphernalia, but only as a misdemeanor. And a substantial number do not even criminalize simple possession of paraphernalia, the conduct to which Mellouli pleaded. While the state paraphernalia laws differ from one another in the important ways discussed below, they share two broad features in common, each of which highlights how disconnected low-level PDP offenses are from the types of well-defined federal controlled sub-

stance crimes that are the focus of 8 U.S.C. § 1227(a)(2)(B).[2]

First, the definition of "paraphernalia" itself is extremely broad, covering any item that might be used in conjunction with drugs. The Kansas statute is typical in this respect: The statute defines paraphernalia functionally, making it unlawful to "use or possess ... any drug paraphernalia to ... [m]anufacture, cultivate, plant, propagate, harvest, test, analyze or distribute a controlled substance; or ... store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body." Kan. Stat. Ann. § 21-5709; *see also, e.g.*, Tex. Health & Safety Code Ann. § 481.125. Many PDP statutes employ additional criteria for determining whether an object is paraphernalia, including lengthy, non-exclusive lists of items that are typically used in connection with illegal drugs, and a direction to courts to examine circumstantial, "logically-related factors," which can include the presence of drugs, a prior drug conviction, or even national or local advertising relating to a product's use. *See* Regnier, *"Civilizing" Drug Paraphernalia Policy: Preserving Our Free Speech And Due Process Rights While Protecting Children*, 14 N.Y.U. J. Legis. & Pub. Pol'y 115, 126-127 (2010); *see also* Model Drug Paraphernalia Act art. 1 (providing non-exhaustive list of items and enu-

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[2] The statute provides that "[a]ny alien who ... has been convicted of a violation of ... any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable." 8 U.S.C. § 1227(a)(2)(B)(i).

merating "logically related" factors); *see also, e.g.*, Kan. Stat. Ann. § 21-5711.[3]

"[T]he variety of items used in conjunction with illicit drugs is limitless." *Town Tobacconist* v. *Kimmelman*, 462 A.2d 573, 580 (N.J. 1983); *see also United States* v. *Brooks*, No. 07-705-1, 2008 WL 4601924, at *3 (E.D. Pa. Oct. 15, 2008) ("acknowled[ging] that [there is] a limitless list of everyday ... objects" that can constitute paraphernalia). Under the broad, functional definition of paraphernalia employed by these PDP statutes, *any* item, if used or intended for use in connection with any drug, can be paraphernalia.[4] Numerous everyday household items can qualify: Bottles, credit cards, pens, unopened boxes of sandwich bags, balloons, duct tape, or even, as here, a sock.[5]

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[3] The Model Drug Paraphernalia Act (the "Model Act") was issued by the Justice Department in the early 1980s. *See, e.g.*, Gersten, *Drug Paraphernalia: Illustrative of the Need for Federal-State Cooperation in Law Enforcement in an Era of New Federalism*, 26 Sw. U. L. Rev. 1067, 1077 (1997). It has been adopted in some form by a number of states, and many state laws have copied verbatim the Model Act's functional elements of "paraphernalia."

[4] Statutes based on the Model Act are thus broadly inclusive, so much so that they draw Due Process and First Amendment-based criticism. *See generally* Regnier, 14 N.Y.U. J. Legis. & Pub. Pol'y at 119; Note, *The Model Drug Paraphernalia Act: Can We Outlaw Head Shops-and Should We?*, 16 Ga. L. Rev. 137, 141 (1981).

[5] *See, e.g., State* v. *McAllister*, 731 S.E.2d 276 (N.C. Ct. App. 2012) (pill bottle), *rev. denied*, 736 S.E.2d 491 (N.C. 2013); *State* v. *Christian*, 795 N.W.2d 702, 706 (N.D. 2011) ("pen barrels," as well as "an agate stone, a credit card, a pestle, and mashing bowls"); *Commonwealth* v. *Torres*, 617 A.2d 812, 815 (Pa. Super. Ct. 1992) ("three unopened boxes of sandwich bags"). In addition, some states have added items directly into their paraphernalia statutes. Florida, for example, has added to the Model Act's list of items a

Nor is it always necessary to prove that paraphernalia was intended for use with respect to any *specific* drug. Rather, a PDP charge is proven in some States by establishing simply that the item is used or intended for use "with illicit drugs." *Kimmelman*, 462 A.2d at 584 (collecting cases); *see, e.g.*, *State* v. *Lee*, 856 P.2d 1246, 1261 (Haw. 1993) (holding that jury instruction on sale of paraphernalia charge requires "the specific intent that the object(s) be used with illegal drugs," but no mention of any specific drug); *see also, e.g.*, Idaho Crim. Jury Instr. § 408 (elements do not include specification of substance); Md. Crim. Pattern Jury Instr. § 4:24.4 (requiring intended use in connection with a "controlled dangerous substance"); Tenn. Prac. Pattern Jury Instr. – Crim. § 31.03 (requiring used of paraphernalia in conjunction with a "controlled substance" or "controlled substance analogue"). In these States where the controlled substance at issue need not be proven or pleaded to, "paraphernalia" is further untethered from any objective or defined relationship to any particular controlled substance—whether federally scheduled or otherwise.

Second, PDP is a uniformly minor offense—both as a general matter, and particularly compared to offenses involving the possession of actual drugs. *E.g.*, *United States* v. *Grover*, 486 F. Supp. 2d 868, 883 (N.D. Iowa 2007) (at sentencing, referring to PDP conviction as a "minor offense[]"), *aff'd*, 511 F.3d 779 (8th Cir. 2007); *United States* v. *Nelson*, 166 F. Supp. 2d 1091, 1099 (E.D. Va. 2001) (at sentencing, referring to PDP conviction as a "minor" offense, similar to trespassing and traffic infractions). PDP is usually classified as a mis-

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"tank," a "balloon," a "hose or tube," a "2-liter-type soda bottle," and "[d]uct tape." Fla. Stat. § 893.145(12)(r)-(v).

demeanor or a petty offense or infraction under state law. *See, e.g.*, Cal. Health & Safety Code § 11364.7 (paraphernalia offenses classified as misdemeanors); Neb. Rev. Stat. § 28-441 (PDP is an "infraction").[6]

Consistent with their low-level status, PDP charges and convictions proliferate as a catch-all for disfavored conduct that bears some glancing relationship to illicit drugs. As NACDL and others have observed, PDP is a commonly charged misdemeanor in some jurisdictions. *See* Boruchowitz et al., NACDL, *Minor Crimes, Massive Waste* 11 (2009) ("Common misdemeanor offenses include ... paraphernalia offenses."); *see also* Harmell, *Modern Drug Crimes: Unique Strategies For A Changing Environment*, Aspatore (Oct. 2010), 2010 WL 6425215, at *1 ("In the state of Washington, possession of less than forty grams of marijuana and possession of drug paraphernalia are the only drug crimes we see with any regularity charged as misdemeanors."); *cf.* Burris & Ng, *supra* note 6, at 88 & nn.42 ("Anecdotal evidence and research suggest that [paraphernalia] laws are often enforced, at least in some states."); *id.* at 75 (noting public health research on the enforcement of paraphernalia laws in syringe cases indicating many hundreds of cases annually in some States).

These low-level offenses are usually punished by probation or a fine, or perhaps a short period of incar-

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[6] *See also* Burris et al., *Lethal Injections: The Law, Science, and Politics of Syringe Access for Injection Drug Users*, 37 U.S.F. L. Rev. 813, 828 (2003) (paraphernalia offense is "typically a misdemeanor"); Burris & Ng, *Deregulation of Hypodermic Needles and Syringes As A Public Health Measure: A Report on Emerging Policy and Law in the United States*, 12 Geo. Mason U. Civ. Rts. L.J. 69, 88 (2001) ("In most states, a paraphernalia law violation is a misdemeanor.").

ceration. For example, in Montana, "[a] person convicted of a first violation of [PDP] is presumed to be entitled to a deferred imposition of sentence of imprisonment." Mont. Code Ann. § 45-10-103; *see also, e.g.*, Colo. Rev. Stat. § 18-18-428 (1992) (providing that possession of drug paraphernalia is punishable by a fine of not more than $100).

By contrast, possession of actual drugs (rather than just paraphernalia) is often subject to felony status or even mandatory minimum periods of incarceration, in addition to other collateral consequences. For example, in Minnesota, the lowest-level drug possession charge, which applies to any substance other than a small amount of marijuana, can result in up to five years' incarceration. *See* Minn. Stat. Ann. § 152.025(2). A similar offense in Mississippi is punishable as a felony and may result in a period of incarceration of up to 20 years, even for first-time offenders. Miss. Code. Ann. § 41-29-139(d)(1), (2), (4). Indeed, the only "drug crime" to which PDP bears any practical resemblance as a matter of charging and sentencing is low-level marijuana possession—an offense that is expressly exempted from the INA's controlled substances removability provision. *See* 8 U.S.C. § 1227(a)(2)(B)(i) (exception to removability for first offense involving 30 grams or less of marijuana). As a practical matter, then, PDP offenses are categorically different from the types of federal controlled-substance crimes that trigger removability.

Simple PDP is thus broadly applicable to any defendant facing a potential drug possession-related charge, but comes without the relatively severe state-law punishments and consequences of other drug-related offenses. *Compare, e.g.*, Miss. Code. Ann. § 41-29-139(d)(1), (2), (4) (up to 20 years in prison for non-marijuana drug offenses), *with id.* § 41-29-139(d)(1)

(maximum six months' incarceration for misdemeanor possession of paraphernalia). As explained in further detail below, that combination of qualities makes PDP a significant feature of the contemporary landscape for resolution of drug prosecutions—and a frequent basis for plea deals, which in turn helps avoid the costs of litigation, chemical testing, and trial. Both of these features set PDP apart from the types of higher-penalty federal controlled-substance crimes that Congress included as removal grounds in § 1227.

Notwithstanding these two general similarities—a broad, functional definition of "paraphernalia" and low-level offense status—state PDP laws are highly variable in other key respects that also highlight the incongruity between PDP and the goals of removal under § 1227. Far from supporting a uniformly applicable set of rules governing removability, bound tightly to federally-scheduled substances, the Eighth Circuit's rule would produce the opposite result: conduct that is not even criminal in one State will render a noncitizen deportable in another. *See Lopez* v. *Gonzales*, 549 U.S. 47, 60 (2006) ("Congress knows that any resort to state law will implicate some disuniformity ... , but that is no reason to think Congress meant to allow the States to supplant its own classifications when it specifically constructed its immigration law to turn on them."); *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563, 575 (2010) (rejecting rule that would "render the law of alien removal ... dependent on varying state classifications even when Congress has apparently pegged the immigration statutes to the classification Congress itself chose").

For example, while a number of States—like Kansas—make simple possession of paraphernalia a crime, others do not. New York's paraphernalia statute is oriented specifically towards drug sales, and only covers

items used for drug production and commerce, *e.g.*, "for purposes of unlawfully mixing, compounding, or otherwise preparing any narcotic drug or stimulant" or "for purpose of unlawfully manufacturing, packaging or dispensing of any narcotic drug or stimulant." N.Y. Penal Law § 220.50; *see also* N.Y. Gen. Bus. L. § 851 (violation of General Business Law to possess paraphernalia with intent to sell or purchase it). Thus, Mellouli's use of his sock would not have been a crime in New York or in many other States. *See generally* NIJC Amicus Br.

Of course, States are permitted to criminalize different conduct, and the non-uniformity of state criminal laws is an acceptable feature of the federal system. Immigration law, however, should be uniform. *See Arizona* v. *United States*, 132 S. Ct. 2492, 2498 (2012). Yet under the Eighth Circuit's rule, conduct that is not even unlawful in one State (and therefore would not trigger removal either) might result not only in a low-level criminal conviction, but also in removability in another State, *regardless* of whether it involves a federally controlled substance. That is deeply at odds with this Court's case law, which has consistently rejected rules that would accord different removal effect to convictions for similar conduct. *See, e.g.*, *Moncrieffe*, 133 S. Ct. at 1693 n.11 (underscoring that this Court's approach ensures "that all defendants whose convictions establish the same facts will be treated consistently, and thus predictably, under federal law").

2. A rule that categorically deems state paraphernalia offenses to relate to federally controlled substances impermissibly allows States to define and expand the bases for removal unilaterally

The state-by-state variations in paraphernalia statutes discussed above are only exacerbated by the state-by-state variations as to which substances are controlled under state law. Even in the instances when States do require some proven connection between paraphernalia and an illicit drug, *see supra* p. 10, the illicit substance may be one that is unlawful under state law, but not under federal law.

The federal government's and the state governments' lists of prohibited drugs were originally virtually identical, due to the States' mass adoption of the Uniform Controlled Substances Act ("UCSA"). *See* 1 Uelmen et al., *Drug Abuse and the Law Sourcebook* § 1:29 (2013 ed.); *see also* Pet. App. 4 (Eighth Circuit noting that the UCSA "was drafted to maintain uniformity between the laws of the several States and those of the federal government" (internal quotation marks omitted)). However, "because the classification of substances under the [federal Controlled Substances Act] changes over time based on federal administrative action, uniformity in the overall classification scheme does not always translate into uniformity as to whether a specific substance has been scheduled." Uelmen, *Drug Abuse* § 1:29. Moreover, States can and do revise their drug schedules according to their own policies and priorities. Accordingly, "[w]hile the UCSA serves as the foundation for the controlled substances laws across the country, states have tailored it to their own needs with a variety of changes, big and small." *Id.* § 1:28.

State lists of controlled substances often automatically encompass updates to the federal list, letting States "piggyback on a federal scheduling action." *See* Uelmen, *Drug Abuse* § 1:30; *see also* UCSA § 204 cmt. (rev. 1994) ("States that would not have a delegation of legislative authority problem may want to replace the specific list of substances with an adoption of the federal schedules by reference[.]"). But this practice of "piggybacking" goes only one way, and the States' own lists of controlled substances often include the drugs outlawed by the federal Controlled Substances Act as well as additional drugs outlawed by the State for its own public policy reasons. For example, "California law regulates the possession and sale of *numerous* substances that are not similarly regulated by" federal law. *Ruiz-Vidal* v. *Gonzales*, 473 F.3d 1072, 1078 (9th Cir. 2007) (emphasis added), *abrogated on other grounds as recognized in Cardozo-Arias* v. *Holder*, 495 F. App'x 790 (9th Cir. 2012); *accord Mielewczyk* v. *Holder*, 575 F.3d 992, 995 (9th Cir. 2009).[7] Kansas likewise prohibits a number of drugs that are not barred under federal law, including salvia and jimson weed. *See* Pet. Br. 3; Pet. App. 4-5; *see also* Detrick, *Salvia Takes a Starring Role*, N.Y. Times, Dec. 23, 2010 (noting that while salvia possession is legal in California and under federal law, "[s]everal states have banned the herb").

The upshot of the Eighth Circuit's rule dispensing with the need to establish some connection between a

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[7] Similarly, Pennsylvania's "controlled-substances schedules list drugs that are not in the federal schedules," *Rojas* v. *Attorney Gen.*, 728 F.3d 203, 206 (3d Cir. 2013) (en banc), as do Connecticut's, *United States* v. *Lopez*, 536 F. Supp. 2d 218, 221 (D. Conn. 2008), Hawaii's, *Ragasa* v. *Holder*, 752 F.3d 1173, 1176 (9th Cir. 2014), and Arizona's, *Huerta-Flores* v. *Holder*, __ F. App'x __, 2014 WL 3361435 (9th Cir. July 10, 2014), just to name a few.

state PDP conviction and a federally controlled substance is that States may unilaterally expand immigration law's removability grounds by banning the use and possession of substances that are permitted under federal law. *See Rojas*, 728 F.3d at 213 (rule adopted by the Eighth Circuit "effectively permit[s the States] to control who may remain in the country via their controlled-substance schedules"). Because, as discussed above, paraphernalia offenses encompass possession of virtually any item associated with an illegal drug, increasing the number of substances controlled under state law also necessarily expands the scope of PDP statutes. The Eighth Circuit's rule thus pushes the outer reaches of removability even further from the boundaries set by Congress.

Moreover, the Eighth Circuit's rule has no clear limits. Under the Eighth Circuit's interpretation of § 1227, a noncitizen could potentially be deported for possession of a trick-or-treat bag or a Big Gulp cup if a state passed a law listing "jelly beans or large sugary beverages" as controlled substances. *See Rojas*, 728 F.3d at 210, 212 & n.7, 213; *Desai* v. *Mukasey*, 520 F.3d 762, 766 (7th Cir. 2008). It is unclear under this approach at what point a State's list of prohibited drugs (which in turn controls what items constitute paraphernalia) would diverge enough from the federal list to be no longer "related to" the list of prohibited substances in the federal Controlled Substances Act. *See Rojas*, 728 F.3d at 213 ("It is left unexplained just how many substances a state would have to include in its lists that are not in the federal lists before its drug-related offenses would no longer qualify as removable offenses, or whether inclusion of a particularly odd substance ... would suffice."). Under the Eighth Circuit's rule, the mere fact that Kansas adopted the UCSA means that

any PDP conviction suffices to establish removability, regardless of how far Kansas's schedules of controlled substances depart from the federal schedules. And its rule admits of significant disparity between the States, permitting "a patchwork of removability rules dependent on the whims of the legislatures of the fifty states." *Id.*; *see also supra* pp. 13-16.

Rules like the Eighth Circuit's are clearly and properly disfavored: "Congress knows that any resort to state law will implicate some disuniformity in state misdemeanor-felony classifications, but that is no reason to think that Congress meant to allow the States to supplant its own classifications when it specifically constructed its immigration law to turn on them." *Lopez*, 549 U.S. at 60; *see also Arizona*, 132 S. Ct. at 2498; *Toll* v. *Moreno*, 458 U.S. 1, 10 (1982). Considered from every angle, and particularly from the ground floor of our criminal justice system, PDP offenses—low-level misdemeanors that often require no connection to any specific drug, let alone a federally scheduled one—bear no serious resemblance to the federally defined controlled-substance crimes that trigger automatic removability under 8 U.S.C. § 1227.

B. The Circumstances Under Which PDP Offenses Are Charged And Pleaded Only Exacerbates The Untoward Effects Of The Eighth Circuit's Rule

Because PDP offenses are non-specific, low-level misdemeanors, pleading to a PDP offense often affords no opportunity to grapple with the serious immigration consequences that the Eighth Circuit's rule now requires. And because PDP pleas are commonplace, the practical effects of the Eighth Circuit's rule will be far-reaching and unjust for noncitizen criminal defendants.

A PDP plea arises, like any other misdemeanor plea, in an overburdened misdemeanor system where the pressure to plead is high, with little time to assess the consequences (especially in a complicated legal regime), and with little process or fanfare. Over 10 million misdemeanor cases were charged in 2006, and that figure continues to grow. *See* Boruchowitz et al., *Minor Crimes, Massive Waste* 11, 21, 39. The misdemeanor system is characterized by a "meet-and-plead" paradigm: In many jurisdictions, a significant number of cases are resolved at a defendant's first appearance, in a series of brief, seriatim proceedings.

Such pleas help the criminal justice system move more quickly, and are often the best and most effective result that defenders can secure for their clients. They are part of, and essential to, the large-scale operation of the American criminal justice system. *See, e.g.*, Hashimoto, *The Price of Misdemeanor Representation*, 49 Wm. & Mary L. Rev. 461, 473 (2007) ("[A] public defender under pressure from an enormous caseload who is trying to stay on top of that caseload 'must inevitably enter guilty pleas for most of his clients, and as a public defender becomes attuned to his work, the guilty plea may tend to become his almost instinctive response to all but the most serious or exceptional cases.'" (quoting Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 Yale L.J. 1179, 1254 (1975)); *see also* Alexander, *Go To Trial: Crash The Justice System*, N.Y. Times, Mar. 10, 2012 ("If everyone charged with crimes suddenly exercised his constitutional rights, there would not be enough judges, lawyers or prison cells to deal with the ensuing tsunami of litigation.").

Where a misdemeanor defendant has a right to counsel for PDP offenses—and he is not afforded such a right in every State, as explained below—a defender

may often already have a plea offer in hand before meeting the client for the first time, and may only have a few minutes with the client before a decision point is reached, *see* Boruchowitz et al., *Minor Crimes, Massive Waste* 31-32. The pressure to plead due to docket sizes, the prospect of not making bail, and the threat of more serious charges is inescapable. *Id.* at 33-36.

What is more, where misdemeanor defendants *do* have the right to counsel because of the potential criminal exposure under state law, NACDL has documented numerous instances where defendants are simply not afforded the right to counsel (or make uninformed waivers of the right) in violation of *Alabama* v. *Shelton*, 535 U.S. 654 (2002). Observers in Pennsylvania, for example, reported misdemeanor defendants being directed to a basement room in the courthouse to negotiate directly with prosecutors. Although seemingly at odds with *Shelton*, these practices occurred even when misdemeanor defendants faced periods of incarceration. *See* Boruchowitz et al., *Minor Crimes, Massive Waste* 14-17. More broadly, in some jurisdictions, a defendant may in effect be asked to waive the right to counsel at the outset in exchange for a sentence of no incarceration. *Cf. United States* v. *Pollard*, 389 F.3d 101, 105 (4th Cir. 2004) (no violation of Sixth Amendment right to counsel where uncounseled defendant received a stand-alone sentence of probation).

Nor is a probing plea colloquy required in many states. *See, e.g., Fleming* v. *State*, 972 So. 2d 831, 832 (Ala. Crim. App. 2006) (no plea colloquy required for "minor misdemeanors" where a defendant will not be incarcerated); *Maloney* v. *State*, 684 N.E.2d 488, 491 (Ind. 1997) (misdemeanor plea colloquy may be waived); Iowa Ct. R. § 2.8(2)b.5 (defendant may waive colloquy procedure if they "sign a written document that in-

cludes a statement that conviction of a crime may result in the defendant's deportation or other adverse immigration consequences if the defendant is not a United States citizen"); Ohio Crim. R. 11(D), (E); *see also* N.Y. C.P.L.R. § 220.50(7) (court only required to advise defendant of possible immigration consequences of plea if the noncitizen pleads guilty to "a count or counts charging a felony offense"). NACDL observers in Washington State observed that misdemeanor proceedings "took an average of five minutes from presentation to sentencing." One defendant "was sentenced to 10 days in jail and a $500 fine for marijuana possession in less time than it takes to get a hamburger from a McDonald's drive-through window." Boruchowitz et al., *Minor Crimes, Massive Waste* 32.

These features of the misdemeanor charging-and-pleading system are exacerbated in the context of PDP statutes, which, as discussed above, *see supra* p. 11, are among the most frequently invoked criminal laws. And to the extent serious immigration consequences attach to PDP convictions, the limited procedural protections accorded to immigrant misdemeanor defendants take on grave constitutional dimensions. With little time or assistance in understanding the consequences of their pleas, immigrants charged with PDP may simply fail to apprehend the seriousness of their decisions. *See generally infra* Part II.[8] In particular, the absence of a

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[8] The plea-bargaining calculus differs for immigrant defendants in critical ways, specifically in the context of PDP statutes, making it all the more important that defendants charged with PDP offenses have the opportunity to consider the alternatives carefully and thoroughly. For example:

> [C]onsider the not uncommon case in which police stop a driver for speeding and discover what appears to be paraphernalia for smoking marijuana. Prosecutors in these

probing colloquy not only prevents noncitizen defendants from creating a record that might help them in later immigration proceedings—for example, by establishing that the controlled substance to which the paraphernalia relates is not in fact scheduled under federal law, *see supra* pp. 15-16 & n.7—but also makes it less likely that they will be informed of the potential immigration consequences of a quick plea in the first place. This prospect is all the more problematic for uncounseled noncitizen defendants, who look to the court accepting the plea as their source of needed information or at least a warning about potential immigration consequences. *Cf. Padilla* v. *Kentucky*, 559 U.S. 356, 368-369 (2010).

II. THE EIGHTH CIRCUIT'S RULE SOWS UNCERTAINTY AND UNFAIRNESS FOR NONCITIZENS AND CRIMINAL DEFENSE LAWYERS AND UNDULY BURDENS THE COURT SYSTEM

The Eighth Circuit's interpretation of § 1227 also creates a number of problems for criminal defense law-

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> cases routinely charge both reckless driving and possession of drug paraphernalia (PDP), and then offer a plea to the PDP charge with probation or time-served. For many defendants this may be a beneficial bargain, because that charge won't result in drivers license points and they can return immediately to their lives. But for noncitizens, the PDP offense qualifies as a deportable controlled substance offense.

Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 Cardozo L. Rev. 1751, 1782-1783 (2013). Accordingly, highly capable defenders have described taking "worse" deals for their clients rather than plead to PDP because of the potential immigration consequences. *See* Chapin et al., *Panel Discussion III: Recognizing and Addressing Immigration Concerns in the Criminal Process*, 9 Tenn. J.L. & Pol'y 185, 198 (2013).

yers and their noncitizen clients, and the court system as a whole. The court of appeals' decision makes it more difficult for defense attorneys to fulfill their *Padilla* duties and for uncounseled noncitizens to understand precisely what kind of conviction triggers immigration consequences. It imposes a burden on the court system as a whole by requiring judges, defense attorneys, and prosecutors to become experts on the thousands of substances banned under state and federal law and by making it more likely that noncitizen criminal defendants will choose to go to trial. The Eighth Circuit's rule also makes it more likely that noncitizens will receive disproportionate punishment for their conduct.

A. The Eighth Circuit's Rule Severely Complicates Defense Attorneys' Constitutional Duty To Provide Correct Advice Regarding The Immigration Consequences Of A Criminal Conviction

The "simple reality" of our criminal justice system is that nearly 95% of all criminal convictions derive from plea bargains. *Missouri* v. *Frye*, 132 S. Ct. 1399, 1407 (2012). Accordingly, defense attorneys have long recognized their ethical obligations in plea negotiations, including the duty to inform their clients "to the extent possible" of "the possible collateral consequences that might ensue" from accepting a guilty plea, such as the plea's effect on the client's immigration status. *See* ABA Standards for Criminal Justice, *Pleas of Guilty* § 14-3.2(f) (3d ed. 1999); *see also* Nat'l Legal Aid & Defender Ass'n, *Performance Guidelines for Criminal Representation* § 6.2(a)(3) (1995); Reimer, Frye *and* Lafler: *Much Ado About What We Do—And What Prosecutors And Judges Should Not Do*, The Champion, Apr. 2012, at 7, 7.

Recently, this Court recognized that these duties were constitutionally required. *See Padilla*, 130 S. Ct. at 1482. Decided against a backdrop of an "increasing number of crimes triggering deportation and the decreasing availability of equitable relief," Lee, *De Facto Immigration Courts*, 101 Calif. L. Rev. 553, 563 (2013), *Padilla* explained that a defendant may argue ineffective assistance of counsel due to his attorney's incorrect "advice regarding deportation." *Padilla*, 130 S. Ct. at 1482; *see also Frye*, 132 S. Ct. at 1406 ("*Padilla* held that a guilty plea, based on a plea offer, should be set aside because counsel misinformed the defendant of the immigration consequences of the conviction."). Indeed, a defense attorney has a constitutional obligation to conduct an inquiry into "adverse immigration consequences" facing his client even "[w]hen the law is not succinct and straightforward." *Padilla*, 130 S. Ct. at 1483 & n.10 (although "deportation consequences are often unclear[,] [l]ack of clarity in the law ... does not obviate the need for counsel to say something about the possibility of deportation").

Padilla was followed by *Frye* and *Lafler* v. *Cooper*, 132 S. Ct. 1376 (2012), in which this Court explained that a defense attorney potentially provides ineffective assistance when he fails to notify his client of, or offers incorrect advice regarding, a plea deal. *See id.* at 1384 ("Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process."); *see also* Garcia Hernandez, Strickland-*Lite*: Padilla's *Two-Tiered Duty For Noncitizens*, 72 Md. L. Rev. 844, 863 (2013) ("[N]ot providing advice, or providing inaccurate advice that leads to a worse outcome, whether by pleading to a worse offer or by conviction after trial, can serve as the basis of an ineffective assistance claim."). Even after a full and fair trial has been

held, a defendant can make out an ineffective assistance claim if he can demonstrate both inaccurate advice and that "but for the [advice] there is a reasonable probability that the plea offer would have been presented to the court ..., that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Lafler*, 132 S. Ct. at 1385.

These three decisions articulate a constitutional requirement that criminal defense attorneys provide their clients with accurate information about both the immigration consequences of a plea and their odds of success at trial if they do not take their plea. Here, the immigration statute is clear: The state conviction must relate to a federally controlled substance. And the state statute of conviction by its express terms covers conduct unrelated to a federally controlled substance. When the statute is clear in this way, a defense lawyer should be able to rely on the express terms of the statute when advising his or her noncitizen client so that the goal of *Padilla* that noncitizens understand the immigration consequences of the choices that they make during criminal proceedings may be fulfilled. *See Padilla*, 130 S. Ct. at 1480 ("The importance of accurate legal advice for noncitizens accused of crimes has never been more important.").

B. The Eighth Circuit's Rule Places Defense Attorneys In An Intractable Situation And Burdens The Court System As A Whole

Courts have taken two routes to interpreting the scope of 8 U.S.C. § 1227(a)(2)(B)(i). The Third Circuit sitting en banc has adopted a commonsense reading of the provision, concluding that the phrase "as defined

in" the federal Controlled Substances Act means that the state crime the defendant is convicted of must be related to a drug prohibited by federal law. *See Rojas*, 728 F.3d at 205; *see also Desai*, 520 F.3d at 766 (noting that the provision does not give the States "free rein to define their criminal laws in a manner that would allow them to effectively usurp the federal government's authority" over immigration law). The Eighth Circuit's interpretation is not only contrary to the plain meaning of the statute but also "effectively permit[s the States] to control who may remain in the country via their controlled substance schedules." *Rojas*, 728 F.3d at 213. Like the Third Circuit, the Eighth Circuit in this case acknowledged that the drugs prohibited by a State "may not 'map perfectly'" on to the federal Controlled Substances Act, Pet. App. 4, but nonetheless concluded that *any* drug paraphernalia offense under a state statute that covers some federal substances renders a criminal defendant deportable under § 1227(a)(2)(B)(i), *see* Pet. 16-17 & n.5.

The Eighth Circuit held that Mellouli's PDP conviction was sufficient to render him removable despite the fact that it was never established that the PDP charge was connected to a federally scheduled drug. This rule places criminal defense attorneys in an intractable situation and places an additional burden on the entire court system.

First, defense attorneys should be able to rely on the statutory text in order to comply with their duties under *Padilla* to advise noncitizens regarding the immigration consequences of a conviction. The Eighth Circuit's rule confounds that straightforward approach by transforming state statutes that do not on their face necessarily implicate federally controlled substances into plausible bases for removal.

Second, to the extent that the government's position that the petitioner satisfies the "realistic probability" test only by showing actual prosecutions for non-federally controlled substances requires a noncitizen to prove that his conviction—or those of others prosecuted and convicted by plea under the same statute—relates to a non-federal substance, the misdemeanor plea bargaining process generally provides neither the need nor the occasion to spend time developing a record about the drug at issue. *See supra* Part I.B. Prosecutors have numerous incentives to reach a quick plea bargain in the mine run of cases. *See* Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2740-2741 & n.17 (2004); Johnson, *Effective Assistance of Counsel and Guilty Pleas—Seven Rules to Follow*, The Champion, Nov. 2013, at 24, 25 ("[T]he best plea offers are often made early on in the life of a case (usually because the prosecutor is interested in avoiding as much work on the case as possible)[.]"). And having a defense attorney introduce additional information about his client's purported crime—such as proof that it related to a particular non-federal controlled substance—risks simply handing the prosecutor ammunition she can use if the case ultimately goes to trial. Johnson, *Effective Assistance*, at 28 ("If there is a legitimate chance that the case may go to trial, then giving the prosecutor additional information about the case ... likely will not be worth the risk.").

Moreover, with respect to paraphernalia offenses, some States specify that the controlled substance with which the paraphernalia was to be used is an element of the offense, while others do not. *Compare, e.g.*, Ind. Pattern Jury Instr., Crim. Instr. No. 8.29 (substance must be named in jury instruction), *with* Ill. Crim. Pattern Jury Instr. § 17.66 (jury instruction calls for speci-

fication of either "cannabis" or "a controlled substance"). In some States, that requirement applies only to paraphernalia statutes that address more than simple possession: Florida, for example, requires that the specific substance be proven with respect to possession with intent to deliver paraphernalia, but not with respect to simple PDP. *Compare In re Standard Jury Instructions In Criminal Cases*, 969 So. 2d 245, 273 (Fla. 2007) (charge for violation of Fla. Stat. § 893.147(1), simple PDP), *with id.* at 276 (charge for violation of Fla. Stat. § 893.147(2), possession with intent to deliver paraphernalia).[9]

The Eighth Circuit's rule also places an additional, significant resource burden on the criminal and immigration systems. Its impact is not limited to defense attorneys, although they will certainly be affected. *See* Lee, *De Facto Immigration Courts*, at 594 (observing that "defense attorneys often must contend with resource and time constraints" and discussing study noting that some part-time defense attorneys handle the equivalent of 19,000 cases a year, leaving them only roughly seven minutes per case); *cf.* Johnson, *Effective Assistance*, at 27 ("*Padilla*'s requirement of accurate advice regarding the consequences of a guilty plea requires, at the most basic level, that defense attorneys

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[9] Additionally, in NACDL's experience, it is inherently more difficult for a defense attorney to provide his client with adequate advice when the collateral consequences of a conviction are far more serious than the prison time for the underlying offense for which the lawyer is representing the client. A defendant's decision to go to trial—even when the evidence is against him—is a peculiarly personal choice when the alternative is potentially automatic deportation. Such advice is all the more difficult to give in the case of indigent clients, since representation in any follow-on immigration proceeding may not be covered by the same attorney, or indeed any attorney at all.

focus more time and attention to the advice they provide clients before a plea."). The Eighth Circuit's rule will also require federal courts and immigration judges, as well as government attorneys in immigration court, to become experts on the chemical properties of the countless substances banned by the federal government and the States to determine whether a State's schedules or individual banned substances are sufficiently related to federally prohibited drugs to trigger immigration consequences. *See Rojas*, 728 F.3d at 212 (rule adopted by the Eighth Circuit "would require immigration agencies and federal courts to become lab experts").

More broadly, the Eighth Circuit's rule risks spurring more trials for relatively minor crimes, thus expending the time and energy of the prosecution, the defense, and the court. *See* Lee, *De Facto Immigration Courts*, at 590 & n.195 ("[F]or defendants arrested for petty conduct, *Padilla* very much matters.... [O]ne foreseeable consequence of *Padilla* is that noncitizen defendants will be more willing to reject a plea offer."); Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. Rev. 1126, 1195-1196 & n.315 (2013) (discussing anecdotal evidence that noncitizens facing a potential conviction with immigration consequences are more likely to go to trial); *see also* Johnson, *Effective Assistance*, at 26 ("[E]ven a small increase in the percentage of cases that are taken to trial in a particular jurisdiction would place significant strain on the prosecutor's office and the police."); Alexander, *Go to Trial: Crash the Justice System* ("[I]f the number of people exercising their trial rights suddenly doubled or tripled in some jurisdictions, it would create chaos.'"). This Court has previously refused to "so burden the Nation's trial courts ab-

sent any genuine affront to [constitutional principles]," *Oregon* v. *Ice*, 555 U.S. 160, 172 (2009); it should not do so here either.

C. The Eighth Circuit's Rule Also Entails Significant Unfairness For Noncitizens, Whether Or Not Represented By Counsel

Finally, the Eighth Circuit's rule will have unjust consequences for noncitizens.

First, it creates a gap between the wrongfulness of a noncitizen criminal defendant's conduct underlying the conviction and the resulting consequences. Holding that such a conviction triggers § 1227, which carries the possibility of mandatory deportation, leads to disproportionate penalties for relatively minor crimes. *See Padilla*, 130 S. Ct. at 365 ("We have long recognized that deportation is a particularly severe 'penalty' ... "). Relatedly, even if the government's case that a noncitizen criminal defendant was in possession of drug-related paraphernalia is weak, the noncitizen may choose to plead guilty to an entirely different, and more serious, offense—possession of a substance prohibited only under state law—in order to avoid triggering § 1227 under the doctrine established in the BIA's decision in *Matter of Paulus*, 11 I. & N. Dec. 274, 276 (BIA 1965). *See Matter of Martinez Espinoza*, 25 I. & N. Dec. 118, 121 (BIA 2009) (*Paulus* "require[s]" "correspondence between the Federal and State controlled substance schedules ... for cases involving the possession of particular substances"). Under this scenario, too, the Eighth Circuit's rule would produce a penalty disproportionate to the wrongful conduct.

Second, the Eighth Circuit's rule improperly undermines the categorical approach's minimum conduct test. *See generally* Pet. Br. 27-29. As this Court has

held, the categorical approach permits the reviewing court to conclude that a state conviction matches a generically described federal offense "only if a conviction of the state offense necessarily involved facts equating to the generic federal offense." *Moncrieffe*, 133 S. Ct. at 1685 (alterations omitted). In other words, the state conviction categorically triggers removal "only if the [state] statute's elements are the same as, or narrower than, those of the generic offense." *Descamps* v. *United States*, 133 S. Ct. 2276, 2281 (2013). By holding that *any* state drug paraphernalia conviction from a State that has adopted the UCSA "relate[s]" to a federally controlled substance—even though the list of drugs potentially underlying a state conviction is inarguably different than the list of federally scheduled drugs, *see* Pet. App. 10—the Eighth Circuit's rule inappropriately expands the type of noncitizen conduct that potentially triggers automatic deportation.

Third, the Eighth Circuit's rule will lead to noncitizens spending more time in confinement during removal proceedings—regardless of whether they are ultimately deported. This is because under the government's interpretation of the INA, an immigration judge may not grant bond to noncitizens who are deportable for federally-controlled substance offenses as defined by 8 U.S.C. § 1227(a)(2)(B). *See* 8 U.S.C. § 1226(c); *Demore* v. *Kim*, 538 U.S. 510, 514 n.3 (2003). And detention generally leads to lack of access to counsel or to other resources that would allow noncitizens to pursue valid challenges to their removal, or even their continued detention. Experienced defenders have seen clients with a single, decades-old misdemeanor on their records accede to removal, despite a potentially meritorious defense to removability, rather than spend

months detained while awaiting the chance to put the government to its proof.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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Petitioner,

v.

ERIC H. HOLDER, JR., Attorney General,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. THE EIGHTH CIRCUIT'S RULING IMPOSES DRASTIC IMMIGRATION CONSEQUENCES FOR STATE CONVICTIONS THAT HAVE MINIMAL PENAL CONSEQUENCES 5

A. Possession of Drug Paraphernalia is Typically Considered a Minor Misdemeanor or Civil Infraction 6

B. Under the Eighth Circuit's Ruling, Minor Drug Paraphernalia Convictions Could Lead to Permanent Removal 11

II. SECTION 1227 SHOULD BE LIMITED TO CONTROLLED SUBSTANCES DEFINED IN THE CSA AND CONDUCT PROHIBITED UNDER FEDERAL CRIMINAL LAW 14

A. Section 1227 Does Not Extend to Convictions for Possession of Drug Paraphernalia 14

B. Interpreting Section 1227 Consistently with Federal Criminal Law Would Ensure the Uniform Application of the Immigration Laws 22

III. THE EIGHTH CIRCUIT'S EXPANSION OF THE REALISTIC PROBABILITY TEST PLACES AN IMPOSSIBLE BURDEN ON NONCITIZENS 24

A. It is Practically Impossible to Locate the Evidence Required Under the Eighth Circuit's Expanded Realistic Probability Test 26

B. Noncitizens Would Face Insurmountable Hurdles Satisfying the Eighth Circuit's Expanded Realistic Probability Test 30

C. The Eighth Circuit's Fact-Intensive Approach Would Overburden the Immigration System and Lead to Inconsistent Results 34

CONCLUSION 37

TABLE OF AUTHORITIES

CASES

Anderson v. Pac. Const. S.S. Co.,
225 U.S. 187 (1912) 19

Badwan v. Gonzales,
494 F.3d 566 (6th Cir. 2007) 34

Bustamante-Barrera v. Gonzales,
447 F.3d 388 (5th Cir. 2006) 24

Carachuri-Rosendo v. Holder,
560 U.S. 563 (2010) 21

Celotex Corp. v. Edwards,
514 U.S. 300 (1995) 16

Demore v. Kim,
538 U.S. 510 (2003) 30

Dent v. Holder,
627 F.3d 365 (9th Cir. 2010) 34

Duncan v. Walker,
533 U.S. 167 (2001) 16

Exxon Mobil Corp. v. Allapattah Servs., Inc.,
545 U.S. 546 (2005) 19

Finley v. United States,
490 U.S. 545 (1989) 19

Gerbier v. Holmes,
280 F.3d 297 (3d Cir. 2002) 24

Gonzales v. Duenas-Alvarez,
549 U.S. 183 (2007) 25

Hernandez v. State,
No. 57320, 2011 WL 4378840 (Nev. Sep. 19, 2011) 28

Howe v. State,
112 Nev. 458 (1996) 28

INS v. Nat'l Ctr. for Immigrants' Rights, Inc.,
502 U.S. 183 (1991) 21

K Mart Corp. v. Cartier, Inc.,
486 U.S. 281 (1988) 15

Lopez v. Gonzales,
549 U.S. 47 (2006) 21

Matter of Espinoza,
25 I. & N. Dec. 118 (B.I.A. 2009) 13

Matter of Gutierrez,
16 I. & N. Dec. 226 (B.I.A. 1977) 31

Missouri v. Frye,
132 S. Ct. 1399 (2012) 27

Moncrieffe v. Holder,
133 S. Ct. 1678 (2013) 21, 24, 25

Nemetz v. INS,
647 F.2d 432 (4th Cir. 1981) 24

Nunez v. Holder,
594 F.3d 1124 (9th Cir. 2010) 27

Ratzlaf v. United States,
510 U.S. 135 (1994) 13

Richardson v. Perales,
402 U.S. 389 (1971) 35

United States v. Menasche,
348 U.S. 528 (1955) 16

Winkelman ex rel. Winkelman v. Parma City School Dist.,
550 U.S. 516 (2007) 20

CONSTITUTION

U.S. Const. art. I, § 8, cl. 4 22

RULES AND STATUTES

8 U.S.C. § 1101 14

8 U.S.C. § 1182 12, 13, 14

8 U.S.C. § 1226 30

8 U.S.C. § 1227 *passim*

8 U.S.C. § 1229a(b) 34, 35

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8 U.S.C. § 1427 12

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21 U.S.C. § 843 16

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720 Ill. Comp. Stat. 570/312(c)(9)	22
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Conn. Gen. Stat. § 21a-267 9, 11

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The National Immigrant Justice Center ("NIJC") and American Immigration Lawyers Association ("AILA") respectfully submit this brief as *Amici Curiae* in support of Petitioner.[1]

INTEREST OF *AMICI CURIAE*

Amici NIJC and AILA are immigration-focused organizations with substantial interest in the Court's resolution of this case.

Amicus NIJC is a Chicago-based non-profit organization accredited since 1980 by the Board of Immigration Appeals ("BIA") to provide representation to individuals in removal proceedings. NIJC promotes human rights and access to justice for immigrants, refugees, and asylum seekers through legal services, policy reform, impact litigation, and public education. Through its staff of attorneys and paralegals, and a network of over 1,000 *pro bono* attorneys, NIJC provides free or low-cost legal services to over 10,000 individuals each year.

Amicus AILA is a national organization comprised of more than 13,000 immigration lawyers throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA's objectives are to advance the administration of law pertaining to

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[1] All parties have consented in writing to the filing of this *Amici Curiae* brief, and counsel for *Amici* will file those consents with the Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than *Amici Curiae*, their members, or counsel made a monetary contribution to the preparation or submission of this brief.

immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in immigration, nationality, and naturalization matters. AILA's members regularly appear in immigration proceedings, often on a *pro bono* basis.

As preeminent organizations in the immigration litigation field, *Amici* share a significant interest in ensuring the fair, uniform, and predictable administration of federal immigration laws. The decision below would impose drastic immigration consequences for all minor drug paraphernalia offenses and place impossible and impractical burdens on individuals in immigration proceedings. *Amici* are uniquely qualified to address the immigration law statutory interpretation questions and substantial policy concerns implicated by this case.

SUMMARY OF ARGUMENT

The Immigration and Nationality Act ("INA") deems deportable any noncitizen "convicted of a violation of * * * any law or regulation of a State, the United States, or a foreign country relating to a controlled substance *(as defined in Section 102 of the Controlled Substances Act (21 U.S.C. § 802))*," other than a single offense involving possession of thirty grams or less of marijuana for personal use. 8 U.S.C. § 1227(a)(2)(B)(i) (emphasis added). The Eighth Circuit reads this provision as rendering noncitizens categorically deportable for any state drug paraphernalia conviction, thereby nullifying the cross-reference to the Controlled Substances Act ("CSA") and distorting this Court's

categorical approach jurisprudence. *Amici* illustrate how the Eighth Circuit's treatment of minor state drug paraphernalia convictions has disproportionate immigration consequences, demonstrate that § 1227(a)(2)(B)(i) should parallel federal criminal law and ensure the fair and uniform application of the nation's immigration laws, and address the substantial injustice resulting from the Eighth Circuit's rule that noncitizens bear the extraordinary burden of proving that categorically overbroad state statutes have been prosecuted in an overbroad manner.

First, the Eighth Circuit's ruling would impose drastic immigration consequences for conduct that is universally considered to be either an extremely minor offense or not a crime at all. Nineteen states and the federal government do not criminalize the conduct for which Petitioner was convicted—the use of a sock to store a controlled substance. And nearly every state that criminalizes this conduct classifies it as a minor misdemeanor punishable by as little as a small fine. Most states do not even provide defendants with the right to counsel in drug paraphernalia prosecutions since there is little chance of incarceration. Yet under the Eighth Circuit's ruling, any noncitizen convicted of a state drug paraphernalia offense would face draconian consequences, including permanent banishment from her home and family in the United States. These drastic immigration consequences stand in stark contrast to the minimal penal consequences imposed by the states. This fundamentally unfair result must be rejected by this Court.

Second, as Petitioner correctly argues, § 1227(a)(2)(B)(i) at a minimum requires that a state

conviction relate to a substance that is "defined in Section 102 of the Controlled Substances Act." However, deportability under § 1227(a)(2)(B)(i) should additionally be limited to conduct prohibited under federal criminal law. Section 1227(a)(2)(B)(i) incorporates by reference the CSA, which specifically defines "controlled substances" *and* broadly delineates conduct "relating to" the federally controlled substances. The Anti-Drug Abuse Act of 1986 ("ADAA") amended § 1227(a)(2)(B)(i) to include this cross-reference to the CSA, while simultaneously expanding the substances and conduct constituting federal drug offenses under the CSA. Nothing in the ADAA or its legislative history suggests that Congress intended to expand deportable conduct beyond that which is prohibited under federal law. The ADAA also amended the CSA to criminalize the *sale* of drug paraphernalia, but not the mere *possession* of paraphernalia. There is therefore no reason to believe that Congress intended to expand § 1227(a)(2)(B)(i) to reach such conduct. Moreover, the Eighth Circuit's contrary interpretation creates a substantial risk that the immigration laws will be applied inconsistently and arbitrarily. Per the Eighth Circuit's interpretation, convictions for substances or conduct that are not criminalized under federal law would render noncitizens deportable in some states, but not others. Congress—which has admonished that the immigration laws must be applied "uniformly"—cannot have intended such a result. Limiting § 1227(a)(2)(B)(i) to conduct prohibited under federal law would ensure that the same underlying conduct would not result in disparate immigration consequences, simply because of variations in state drug laws.

Third, the Eighth Circuit's expansive view of the realistic probability test turns the categorical approach into a fundamentally unfair factual inquiry. Even in cases where the state statute expressly covers conduct that is categorically overbroad, the Eighth Circuit's ruling requires noncitizens to prove that the government has prosecuted a meaningful number of cases in an overbroad manner. This application of the realistic probability test lacks legal support and would place an impossible burden on noncitizens facing removal. There is often no practical way to confirm that a state has applied its drug paraphernalia statute in an overbroad manner. State conviction records are rarely available on standard legal databases. Moreover, even if such records were readily available, noncitizens would face insurmountable hurdles obtaining them. Noncitizens facing deportation under § 1227(a)(2)(B)(i) are subject to mandatory detention, will likely be unrepresented by counsel, and will have extremely limited access to legal materials. The Eighth Circuit's version of the realistic probability test is not only illogical, but would be practically impossible for noncitizens to meet.

ARGUMENT

I. THE EIGHTH CIRCUIT'S RULING IMPOSES DRASTIC IMMIGRATION CONSEQUENCES FOR STATE CONVICTIONS THAT HAVE MINIMAL PENAL CONSEQUENCES

The Eighth Circuit held that a state conviction for possession of drug paraphernalia categorically renders a noncitizen deportable. (Pet. App. 11.) If adopted by this Court, the Eighth Circuit's ruling would inevitably

impose drastic consequences on noncitizens for conduct that is almost universally considered an extremely minor offense or not a crime at all. The Court should reject the Eighth Circuit's unfair and disparate treatment of drug paraphernalia convictions.

A. Possession of Drug Paraphernalia is Typically Considered a Minor Misdemeanor or Civil Infraction

Petitioner was convicted of violating Kansas Statute § 21-5709(b)(2) by using a sock to conceal an unidentified controlled substance. (Pet. Br. 2.) Section 21-5709(b)(2) states:

> It shall be unlawful for any person to use or possess with intent to use any drug paraphernalia to * * * store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body.

Kan. Stat. § 21-5709(b). Whereas Kansas Statute § 21-5709(b)(1) addresses the use of drug paraphernalia to manufacture or produce controlled substances, Kansas Statute § 21-5709(b)(2) is focused solely on the personal use of drug paraphernalia. Specifically, Kansas Statute § 21-5709(b)(2) addresses the personal use of: (1) items, such as small plastic bags, to store or conceal controlled substances; and (2) items, such as pipes, to consume controlled substances.

Other states have adopted different definitions of both the conduct that constitutes illegal personal possession of drug paraphernalia and the types of items that are classified as drug paraphernalia. The common denominator is that nearly every state considers the conduct at issue here—the mere possession or personal

use of drug paraphernalia to conceal or store a controlled substance—to be either a minor misdemeanor or not a crime at all.

The federal drug paraphernalia statute, 21 U.S.C. § 863, criminalizes the sale, transportation, importation, or exportation of drug paraphernalia, *but not* personal use or possession of paraphernalia. Nineteen states, including Alaska, California, Illinois, Indiana, Iowa, Maine, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New York, Oregon, Rhode Island, South Carolina, Vermont, Virginia, West Virginia, and Wyoming, do not criminalize the specific conduct at issue here—the possession of items used to conceal or store a controlled substance.[2] For example, Nebraska specifically excludes the use of items to store or conceal a controlled substance from its misdemeanor drug paraphernalia statute. *See* Neb. Rev. Stat. § 28-441.

Twelve of these nineteen states also do not prohibit the personal use or possession of items, such as a pipe, to consume controlled substances. Five states (Alaska,

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[2] Alaska (no applicable statute); California (Cal. Health & Safety Code § 11364.1(a)); Illinois (720 Ill. Comp. Stat. 600/3.5(a)); Indiana (Ind. Code § 35-48-4-8.3); Iowa (Iowa Code § 124.414); Maine (Me. Rev. Stat. tit.17-A, § 1111-A(4-B)); Massachusetts (Mass. Gen. Laws ch. 94C, § 32I); Michigan (Mich. Comp. Laws § 333.7453(a));, Minnesota (Minn. Stat. § 152.092); Nebraska (Neb. Rev. Stat. § 28-441(1)); New Hampshire (N.H. Rev. Stat. §318-B:26(III)(c)); New York (N.Y. Penal Law § 220.50); Oregon (Or. Rev. Stat. § 475.525(1)); Rhode Island (R.I. Gen. Laws § 21-28.5-2); South Carolina (S.C. Code § 44-53-391(a)); Vermont (Vt. Stat. tit.18, § 4476(a)); Virginia (Va. Code § 54.1-3466); West Virginia (W. Va. Code § 60A-4-403a, § 47-19-1); and Wyoming (Wyo. Stat. § 35-7-1056).

Maine, Oregon, South Carolina and West Virginia)[3] do not criminalize possession or personal use of drug paraphernalia at all, and seven states (Massachusetts, Michigan, New Hampshire, New York, Rhode Island, Vermont, and Wyoming) specifically limit criminal liability to either the sale and distribution of paraphernalia or the use of paraphernalia to manufacture or sell controlled substances.[4] This means that in Michigan, for example, the personal use of drug paraphernalia is not a crime; only the sale of drug paraphernalia is criminalized. *See* Mich. Comp. Laws § 333.7453. Similarly, New York limits its drug paraphernalia statute to the possession of paraphernalia used to manufacture, sell, or distribute controlled substances. N.Y. Penal Law § 220.50. Neither the possession of items to consume a controlled substance nor the possession of items to conceal or store a controlled substance is prohibited. *Id.*

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[3] Alaska (no applicable statute); Maine (Me. Rev. Stat. tit.17-A, § 1111-A(4-B) (classifying possession of paraphernalia as a civil violation); *id.* § 4-B(1) ("All civil violations are expressly declared not to be criminal offenses.")); Oregon (Or. Rev. Stat. § 475.565(1)(a) (imposing civil penalty for violation of paraphernalia statute)); South Carolina (S.C. Code § 44-53-391(c) (possession of paraphernalia punishable by a civil fine, which "shall not give rise to any disability or legal disadvantage based on conviction for a criminal offense")); and West Virginia (W. Va. Code § 47-19-1 (prohibiting sale of paraphernalia without license)).

[4] Massachusetts (Mass. Gen. Laws ch. 94C, § 32I(a)); Michigan (Mich. Comp. Laws § 333.7453(a)); New Hampshire (N.H. Rev. Stat. § 318-B:26(III)(c)); New York (N.Y. Penal Law § 220.50); Rhode Island (R.I. Gen. Laws § 21-28.5-2); Vermont (Vt. Stat. tit.18, § 4476(a)); and Wyoming (Wyo. Stat.§ 35-7-1056).

Additionally, thirty of the thirty-one states that criminalize possession of drug paraphernalia to store or conceal a controlled substance categorize this conduct as a misdemeanor or minor offense.[5] In these thirty states, the penal consequences for drug paraphernalia convictions can be as low as a small fine.[6] For example, in Colorado, possession of drug paraphernalia is classified as a "drug petty offense," which is punishable "by a fine of not more than one hundred dollars." Colo. Rev. Stat. § 18-18-428(2); *see also* Md. Code Crim. Law § 5-619(c)(2)(i) ($500 fine for first offense); Tex. Health

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[5] Alabama (Class A Misdemeanor (Ala. Code § 13A-12-260(c)); Arizona (Ariz. Rev. Stat. § 13-3415(A); *id.*, § 13-604(a) (drug paraphernalia is punishable as a class 1 misdemeanor)); Arkansas (Ark. Code. § 5-64-443(a)(1)); Colorado (Colo. Rev. Stat. § 18-18-428(2)); Connecticut (Conn. Gen. Stat. §21a-267(a), (d)); Delaware (Del. Code tit. 16, § 4774(a)); Florida (Fla. Stat. § 893.147(1)); Georgia (Ga. Code §16-13-32.2(b)); Idaho (Idaho Code § 37-2734A(3)); Kansas (Kan. Stat. § 21-5709(e)(3)); Kentucky (Ky. Rev. Stat. § 218A.500(5)); Louisiana (La. Rev. Stat. §§ 40:1025(A),40:1023(A)); Maryland (Md. Code Crim. Law § 5-619(c)(2)); Mississippi (Miss. Code § 41-29-139(d)(1)); Missouri (Mo. Stat. § 195.233(2)); Montana (Mont. Code § 45-10-103); Nevada (Nev. Rev. Stat. § 453.566); New Jersey (N.J. Stat. § 2C:36-2); New Mexico (N.M. Stat. § 30-31-25.1(C)); North Carolina (N.C. Gen. Stat. § 90-113.22(b)); North Dakota (N.D. Cent. Code, § 19-03.4-03); Ohio (Ohio Rev. Code § 2925.14 (F)(1)); Oklahoma (Okla. Stat. tit. 63, § 2-405(E)); Pennsylvania (35 Pa. Cons. Stat. § 780-113(i)); South Dakota (S.D. Codified Laws § 22-42A-3); Tennessee (Tenn. Code § 39-17-425(a)(2)); Texas (Tex. Health & Safety Code § 481.125(d)); Utah (Utah Code § 58-37a-5(1)(b)); Washington (Wash. Rev. Code § 69.50.412(1)); Wisconsin (Wis. Stat. §§ 961.573, 939.60).

[6] *See supra* note 5.

& Safety Code § 481.125(d) and Tex. Penal Code § 12.23 ($500 maximum fine).

Moreover, the majority of states that criminalize the personal use or possession of drug paraphernalia to store or conceal a controlled substance do not provide defendants with the right to counsel for such prosecutions; that right is only guaranteed in eleven states.[7] Six states, including Kansas, do not guarantee the right to counsel for misdemeanor drug paraphernalia prosecutions.[8] In fourteen other states, the right to counsel is left in the discretion of the court and is generally provided only if it is likely that incarceration would be imposed.[9] Thus, in most states,

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[7] Georgia (Ga. Code §§ 16-13-32.2(b), 17-10-3, 17-12-23(a)(1)); Hawaii (Haw. Rev. Stat. §§ 802-1, 329-43.5(a)); Idaho (Idaho Code §§ 19-852, 19-851(5), 37-2734A(1), (3)); Kentucky (Ky. Rev. Stat. §§ 31.110(1)(a), 31.100(8)(b), 218A.500(2), 532.09(1)); Louisiana (La. Code Crim. Proc. Ann. Art. 511, 513); New Mexico (N.M. Stat. §§ 31-16-3(A) and (D), 30-31-25.1(C)); Ohio (Ohio Rev. Code §§ 120.16(A)(1), 2925.14(F)(1), 2929.24(A)(4)); Oklahoma (Okla. Stat. tit. 22, § 1355.6(A), tit. 63, 2-405(E)); Tennessee (Tenn. Code §§ 40-14-102, 39-17-425(a)(2); *see also* Tenn. R. Crim. P. 44); Washington (Wash. Super. Ct. Crim. R. 3.1(a); Wash. Rev. Code §§ 9.92.030, 69.50.412(1)); Wisconsin (Wis. Stat. §§ 967.06(1), 961.573(1)).

[8] Alabama (Ala. R. Crim. P. Rule 6.1(a); Ala. Code §§ 13A-12-260(c), 13A-5-2(c)); Colorado (Colo. Rev. Stat. §§ 18-18-428(2), 21-1-103(2)); Kansas (Kan. Stat. §§ 21-5709(e)(3), 22-4503); Maryland (Md. Code Crim. Proc. § 16-101, 16-204(b)(1)(i); Md. Code Crim. Law § 5-619(c)(2)(i)); Nevada (Nev. Rev. Stat. §§ 178.397, 453.566); Texas (*See* Tex. Code Crim. Proc. art. 1.051(c)); Tex. Penal Code § 12.23).

[9] Arizona (Ariz. R. Crim. P. 6.1(b); Ariz. Rev. Stat. § 13-901.01(A)); Arkansas (Ark. R. Crim. P. Rule 8.2(b); Ark. Code §§ 5-4-104(d), 5-

a noncitizen charged with possession or personal use of drug paraphernalia will likely have no legal representation and could be completely unaware of the devastating immigration consequences of her conviction.

In sum, the mere possession or personal use of drug paraphernalia, if a crime at all, is considered a minor criminal offense with minimal penal consequences throughout the country.

B. Under the Eighth Circuit's Ruling, Minor Drug Paraphernalia Convictions Could Lead to Permanent Removal

The immigration consequences of the Eighth Circuit's ruling extend far beyond deportability under § 1227(a)(2)(B)(i). Indeed, the Eighth Circuit's interpretation of this provision will leave many noncitizens ineligible to seek relief from removal, and permanently banished from home and family on account of state drug paraphernalia convictions.

64-443(a)(1)); Connecticut (Conn. Gen. Stat. §§ 21a-267(a), 51-296(a), 53a-28(a)-(b)); Delaware (Del. Code tit. 11, § 5103; Del. Super. Ct. Crim. R. 44(a)); Florida (Fla. R. Crim. P. 3.111(b)(1); Fla. Stat. §§ 775.082, 775.083, 893.147); Mississippi (Miss. Code §§41-29-139(d)(1), 99-15-15); Missouri (Mo. Stat. §§195.233(2), 557.011(2), 600.042(4)(2)); Montana (Mont. Code §§ 45-10-103, 46-8-101(3)); New Jersey (N.J. Stat. §§ 2A:158A-5.2, 2C:36-2, 2C:43-2); North Carolina (N.C. Gen. Stat. §§ 7A-451(a)(1), 15A-1340.23(b)-(c), 90-113.22(b)); North Dakota (N.D. R. Crim. P. 44(a)(2); N.D. Cent. Code, §§ 12.1-32-02, 19-03.4-03); Pennsylvania (Pa. R. Crim. P. 122(A)(1); 35 Pa. Cons. Stat. § 780-113(i)); South Dakota (S.D. Codified Laws §§22-42A-3, 23A-40-6.1); Utah (Utah Code §§ 58-37a-5(1)(b), 76-3-201(2), 77-32-302(1)).

First, the Eighth Circuit's ruling would eliminate the ability of many lawful permanent residents to apply for cancellation of removal under 8 U.S.C. § 1229b(a). Under § 1229b(a), the Attorney General may cancel the removal of legal permanent residents if, among other requirements, an individual "has resided in the United States continuously for 7 years after having been admitted in any status[.]" 8 U.S.C. § 1229b(a)(2). However, § 1229b(d)(1)(B) states that the required period of continued residence is deemed to end when a noncitizen has committed an offense identified under § 1227(a)(2)(B)(i). Thus, a drug paraphernalia conviction would preclude many lawful permanent residents who otherwise qualify for cancellation of removal from even seeking this discretionary relief.

Second, a conviction under § 1227(a)(2)(B)(i) is a total bar to cancellation of removal for nonpermanent residents, eliminating an important safety valve for unusual humanitarian situations. Section 1229b(b)(1) permits the Attorney General to cancel the removal of a nonpermanent resident if her removal "would result in exceptional and extremely unusual hardship to [her] spouse, parent or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. § 1229b(b)(1)(D). But a noncitizen is only eligible for this relief if, among other requirements, she "has not been convicted of an offense under section [1182(a)(2), 1227(a)(2) or 1227(a)(3)]." 8 U.S.C. § 1229b(b)(1)(C). Thus, even if the noncitizen's removal would result in extraordinary hardship to a family member, such as a United States citizen child needing particular medical treatment, a misdemeanor conviction for possession of drug paraphernalia would

completely eliminate the possibility of discretionary relief. *See id.*

Third, a state drug paraphernalia conviction would serve as a permanent, unwaivable ground of inadmissibility for most noncitizens thereby preventing lawful immigration at any time in the future.[10] Under 8 U.S.C. § 1182(a)(2)(A)(i)(II), a noncitizen is inadmissible if she has been convicted of "a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in Section 102 of the Controlled Substances Act (21 U.S.C. § 802))." Section 1182(a)(2)(A)(i)(II), which contains identical language to § 1227(a)(2)(B)(i), is therefore also subject to the Eighth Circuit's ruling. *See Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears."). Accordingly, an individual like Petitioner could *never* return to be with his family.

Finally, under the Eighth Circuit's approach, a state drug paraphernalia conviction would implicate the ability of noncitizens to establish "good moral character," which is required for various immigration benefits, such as cancellation of removal, special rule cancellation of removal for battered spouses and children, voluntary departure, and naturalization. *See*

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[10] The BIA has found that the 8 U.S.C. § 1182(h) waiver could extend to a drug paraphernalia conviction, but only if the noncitizen can prove that the offense "relate[d] to a single offense of simple possession of 30 grams or less of marijuana." *Matter of Espinoza*, 25 I. & N. Dec. 118, 123-25 (B.I.A. 2009).

8 U.S.C. §§ 1229b(b)(1)(B), 1229b(b)(2)(A)(iii), 1229c(b)(1)(B), 1427(a)(3). 8 U.S.C. § 1101 bars a finding of good moral character if the noncitizen was convicted of an offense covered under 8 U.S.C. § 1182(a)(2)(A), other than a single offense for possession of thirty grams or less of marijuana. 8 U.S.C. § 1101(f)(3). Again, the ramifications for noncitizens are severe.

In sum, under the Eighth Circuit's ruling, a noncitizen who pleads guilty to misdemeanor possession of drug paraphernalia is not just deportable—she will likely be ineligible for discretionary relief and be barred from ever returning lawfully to the United States. These drastic immigration consequences stand in stark contrast to the minimal criminal consequences for such convictions. This Court should reject the Eighth Circuit's illogical and unfair interpretation of the INA.

II. SECTION 1227 SHOULD BE LIMITED TO CONTROLLED SUBSTANCES DEFINED IN THE CSA AND CONDUCT PROHIBITED UNDER FEDERAL CRIMINAL LAW

A. Section 1227 Does Not Extend to Convictions for Possession of Drug Paraphernalia

Section 1227 incorporates by reference the federal CSA. Specifically, a noncitizen is deportable only if she has been convicted of a state, federal, or foreign offense "relating to a controlled substance *(as defined in Section 102 of the Controlled Substances Act)*." 8 U.S.C. § 1227(a)(2)(B)(i) (emphasis added). Petitioner properly argues that, at a minimum, § 1227(a)(2)(B)(i)

requires that a state conviction relate to a substance that is "defined in the Controlled Substances Act." (Pet. Br. 13-19.) *Amici* agree. Additionally, reading the statute and the 1986 amendments to § 1227(a)(2)(B)(i)[11] in context, the explicit reference to the CSA also requires limiting the provision's reach to conduct that is prohibited under federal criminal law. Because possession of drug paraphernalia is not prohibited under federal law, it is not a deportable offense.

First, § 1227(a)(2)(B)(i) should be read consistently with the CSA in its entirety. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that the Court should consider "the language and design of the statute as a whole"). The cross-reference to the CSA in § 1227(a)(2)(B)(i) does not only provide the definition of a "controlled substance." 21 U.S.C. § 802, the specific provision of the CSA referenced in § 1227(a)(2)(B)(i), also identifies conduct "relating to" these controlled substances, such as delivery (21 U.S.C. § 802(8)), distribution (*id.* § 802(11)), manufacturing (*id.* § 802(15)), production (*id.* § 802(22)), and sale (*id.* §§ 802(46)-(48)).[12] Section 802 also defines a "felony

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[11] At the time of the 1986 amendment, the drug deportation provision found at 8 U.S.C. § 1227(a)(2)(B)(i) was codified at 8 U.S.C. § 1251(a)(11). *See* Pub. L. No. 99-570, tit. I, § 1751, 100 Stat. 3207, 3207-47 (1986). In this brief, any reference to § 1227(a)(2)(B)(i) also refers to § 1251(a)(11).

[12] Respondent appears to argue that § 1227(a)(2)(B)(i) defines "controlled substances" to include items, such as "listed chemicals," which 21 U.S.C. § 802 defines separately from the term "controlled substances." (*See* BIO 9-10.) Section 802 does define other categories of substances, but not *as "controlled substances."*

drug offense." 21 U.S.C. § 802(44). Section 802, however, does not include any reference to paraphernalia. And beyond § 802, the CSA broadly defines what conduct is considered an offense "relating to a controlled substance." *See, e.g.*, 21 U.S.C. §§ 841-844, 863. *Nowhere* does the CSA prohibit the mere possession of drug paraphernalia. *See* 21 U.S.C. § 863. Because § 1227(a)(2)(B)(i) expressly incorporates the CSA by reference, conduct that is neither proscribed in § 802, specifically, nor prohibited by the CSA, generally, should not render a noncitizen deportable.

The Eighth Circuit, however, interprets the "relating to" language in § 1227(a)(2)(B)(i) so broadly that it renders the explicit cross-reference to the CSA superfluous and meaningless. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute.") (quoting *United States v. Menasche*, 348 U.S. 528, 538-539 (1955)) (internal quotations omitted). While the phrase "relating to" is frequently accorded a broad meaning, it must be interpreted consistently with the statutory context in which it sits. *See Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995) (holding that the

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Compare 21 U.S.C. § 802(6) *with* 21 U.S.C. §§ 802(33)-(35) (listed chemicals), *id.* § 802(40) (chemical mixtures). As noted above, however, the CSA also defines conduct associated with those substances. Respondent cannot have it both ways. If § 1227(a)(2)(B)(i) refers to § 802 to define "controlled substance," it must refer only to § 802(6)'s definition of that term. If, by contrast, § 1227(a)(2)(B)(i) incorporates the entire definitional opus of § 802, it follows that Congress not only cross-referenced the definition of "controlled substance," but also the CSA's definition of what conduct constitutes "a violation * * * relating to a controlled substance" under federal law.

phrase "related to," while broad, "cannot be limitless."). Reading § 1227(a)(2)(B)(i) in context, the minimum conduct necessary to satisfy the deportation provision must be limited to controlled substances defined in § 802 and also conduct that the CSA considers to "relat[e] to a controlled substance." The mere possession of drug paraphernalia is not such an offense.

Second, the 1986 amendments to the drug deportation provision demonstrate that § 1227(a)(2)(B)(i) must be read to parallel federal criminal law. Congress amended the INA's deportation provision to include the explicit cross-reference to the CSA as part of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, tit. I, § 1751, 100 Stat. 3207, 3207-47 (1986) (the "ADAA"). Before the 1986 amendments, the predecessor provision of the INA specifically enumerated the substances and conduct that constituted a deportable drug offense, all of which were criminalized under federal law. *See* 8 U.S.C. § 1251(a)(11) (1982).[13] But federal treatment of drug offenses and controlled substances had changed considerably since the enactment of the INA in 1952. *See, e.g.*, Thomas M. Quinn & Gerald T. McLaughlin,

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[13] Prior to the 1986 amendment, a noncitizen was deportable if "convicted" of any law "relating to the illicit possession of or traffic in narcotic drugs or marihuana" or "governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction-sustaining opiate." 8 U.S.C. § 1251(a)(11) (1982).

The Evolution of Federal Drug Control Legislation, 22 Cath. U.L. Rev. 586 (1972) (discussing federal drug laws before and after the 1970 Controlled Substances Act). This is apparent on the face of the 1986 amendments, which—in addition to modifying the language of the INA's deportability provision—substantially amended the federal controlled substances schedules *and* conduct constituting federal drug offenses under the CSA. *See, e.g.*, Pub. L. No. 99-570 at §§ 1002, 1202, 1203. Congress thus opted to simplify and streamline the drug deportability provision in the INA by incorporating the CSA by reference. Pub. L. No. 99-570 at § 1751(b).

The legislative history demonstrates that Congress intended to maintain a connection between the deportation provision and conduct prohibited under federal law. When Congress amended § 1227(a)(2)(B)(i) in 1986, Representative Lungren (the amendment's sponsor) explained that a state drug conviction must still tie to "Federal law" and "Federal offenses":

> Under the present law a sentencing judge has the authority to make a binding recommendation to the Attorney General that an alien *convicted of a variety of Federal offenses* not be deported * * * * Unfortunately, *we have not upgraded that or brought that up to present-day law*, and we only articulate particular drug offenses. * * * *What I say is if you are convicted of any drug offenses on the Federal law*, including those with designer drugs and so forth, the judge may make a recommendation but it is not binding on the Attorney General.

132 Cong. Rec. H6679-02 at 6700-6071 (daily ed. Sept. 11, 1986) (Statement by Rep. Lungren). Representative Hughes confirmed the narrow purpose of the ADAA's amendments to the deportation provision, stating: "as I understand it, what the gentleman is doing is substituting language, Controlled Substances Act language, for specific substances in the act." *Id.* at 6701. And Representative Lungren agreed that this was the amendments' purpose. *Id.* There is no evidence that Congress intended to broaden the scope of the drug deportation provision beyond conduct prohibited under federal law. Rather, the legislative history confirms that Congress merely intended to simplify the deportation provision so that it paralleled federal criminal law.

"Under established canons of statutory construction, 'it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.'" *Finley v. United States*, 490 U.S. 545, 554 (1989) (quoting *Anderson v. Pac. Const. S.S. Co.*, 225 U.S. 187, 199 (1912)), *superseded by statute on other grounds as stated in Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 558 (2005). Nothing in the ADAA or the legislative history of the amendments to § 1227(a)(2)(B)(i) suggests, let alone "clearly expresse[s]," that Congress intended to expand deportable conduct beyond that which is prohibited under federal law. An interpretation of § 1227(a)(2)(B)(i) that contradicts the CSA would thus undermine the Congressional purpose behind its enactment.

Third, the ADAA's broader context further demonstrates that Congress did not consider the possession of drug paraphernalia to be an offense "relating to a controlled substance." *See Winkelman ex rel. Winkelman v. Parma City School Dist.*, 550 U.S. 516, 523 (2007) (holding that proper statutory interpretation "requires a consideration of the entire statutory scheme."). Among other changes to the CSA, the ADAA added the mail order drug paraphernalia statute, 21 U.S.C. § 857, making it unlawful to sell, import, or export drug paraphernalia. Pub. L. No. 99-570 at § 1822.[14] But the ADAA did not criminalize the possession or use of drug paraphernalia. *Id.*[15] It would be inconsistent to interpret the ADAA's amendments to § 1227(a)(2)(B)(i) as extending deportability to possession of drug paraphernalia offenses, while the same act intentionally chose not to criminalize this conduct.

In contrast, limiting § 1227(a)(2)(B)(i) to trafficking in drug paraphernalia (a federal offense), would be entirely consistent with the purpose of the ADAA's

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[14] The contents of 21 U.S.C. § 857 were later transferred to 21 U.S.C. § 863. *See* Crime Control Act of 1990, Pub. L. No. 101-647, tit. XXIV, § 2401(b), 104 Stat. 4858, 4859 (1990).

[15] The ADAA's definition of drug paraphernalia is also inconsistent with the Eighth Circuit's ruling that a drug paraphernalia conviction need not be tied to a federally controlled substance. *See* Pub. L. No. 99-570 at § 1822(d) (defining "drug paraphernalia" to mean "any equipment, product, or material of any kind which is primarily intended or designed for use" in connection with "a *controlled substance in violation of the Controlled Substances Act (title II of Public Law 91-513)* [21 U.S.C. § 802]."") (emphasis added).

amendments to the INA, which were titled the "Narcotics Traffickers Deportation Act." Pub. L. No. 99-570, tit. I, subtitle M, § 1751, 100 Stat. 3207-47; *see also INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("[T]he title of a statute or section can aid resolving an ambiguity in the legislation's text."). Simply put, in light of the ADAA's amendments to the CSA and INA, § 1227(a)(2)(B)(i) should be interpreted to exclude convictions for possession of drug paraphernalia.

This Court routinely looks to federal law to define the federal removal grounds and determine the immigration consequences of a state offense. *See generally Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013); *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); *Lopez v. Gonzales*, 549 U.S. 47 (2006). This is particularly true when, as is the case here, "Congress has apparently pegged the immigration statutes to the classifications Congress itself chose." *Lopez*, 549 U.S. at 58. Section 1227(a)(2)(B)(i)'s explicit incorporation by reference of the CSA must mean that a noncitizen is deportable only when convicted of an offense involving a federally controlled substance and conduct that would necessarily be prohibited under federal law. Because the possession or personal use of drug paraphernalia is not a federal offense under the CSA, this conduct should have no immigration consequences under § 1227(a)(2)(B)(i).

B. Interpreting Section 1227 Consistently with Federal Criminal Law Would Ensure the Uniform Application of the Immigration Laws

Congress is constitutionally empowered to "establish a *uniform* Rule of Naturalization[.]" U.S. Const. art. I, § 8, cl. 4 (emphasis added). Indeed, Congress has declared that "the immigration laws of the United States should be enforced vigorously and *uniformly*." Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, tit. I, § 115, 100 Stat. 3559, 3384 (1986) (emphasis added). Limiting § 1227(a)(2)(B)(i) to federally controlled substances *and* conduct that is prohibited by federal criminal law would advance this goal. The Eighth Circuit's interpretation, by contrast, would lead to inconsistent and arbitrary results.

For example, Jimson Weed (also known as Datura) is not prohibited under the CSA. (Pet. Br. 3.) Indeed, only eight states, including Kansas, criminalize Jimson Weed.[16] But under the Eighth Circuit's ruling, a noncitizen living in Kansas who possesses a sock used to store Jimson Weed is deportable, while a noncitizen living in forty-two other states would face no

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[16] Kansas, Nevada, and Rhode Island include Jimson Weed or Datura in their controlled substance schedules. Kan. Stat. § 65-4105((d)(31); Nev. Admin. Code § 453.510; R.I. Gen. Laws § 21-28-2.08, *amm'd by* 2014 Rhode Island Laws Ch. 14-68 (14-S 2651). An additional five states regulate the use of Jimson Weed or Datura outside of their controlled substance schedules. *See* Conn. Gen. Stat. §§ 21a-240(49); 720 Ill. Comp. Stat. 570/312(c)(9); La. Rev. Stat. § 40:9889.1(C)(2)(i); Neb. Rev. Stat. § 71-2501(1)(a); N.J. Stat. § 26:2-82.

immigration consequences for the same conduct. These disparities are even more pronounced under foreign laws (also potential deportability grounds under § 1227(a)(2)(B)(i)), which classify alcohol, allergy medication, and even poppy seeds as controlled substances. (Pet. Br. 15, 32, 38.)

Similarly, the mere possession of drug paraphernalia is not a federal offense. *See* 21 U.S.C. § 863. And nineteen states do not criminalize the conduct for which Petitioner was convicted—the possession of drug paraphernalia used to store, contain, or conceal a controlled substance. Thus, if Petitioner engaged in the same alleged conduct in Illinois, Massachusetts, New York, or South Carolina, he would never have been convicted of a drug paraphernalia offense. But simply because Petitioner was arrested in Kansas, he was deported, separated from his fiancée, and will never be allowed to legally return to the United States.

Adopting Petitioner's plain text interpretation of § 1227(a)(2)(B)(i) would reduce these disparate and arbitrary results. But even then, individuals in thirty-one states could be deported for a paraphernalia possession conviction involving a federally controlled substance, while individuals in nineteen other states could not be convicted, let alone deported, for the same conduct. This disparity would be avoided entirely by further limiting § 1227(a)(2)(B)(i) to conduct that would necessarily be prohibited under federal criminal law. This approach ensures that noncitizens' immigration status will not depend on variations in state laws and that the deportation provision is applied in a way that comports with the United States Constitution, the

purpose of the INA, and the categorical approach. *See, e.g.*, *Moncrieffe*, 133 S. Ct. at 1693 n.11 (reiterating that the categorical approach is designed to "ensure[ ] that all defendants whose convictions establish the same facts will be treated consistently, and thus predictably, under federal law"); *Bustamante-Barrera v. Gonzales*, 447 F.3d 388, 399 (5th Cir. 2006) (citing "overarching constitutional interest in uniformity of federal immigration and naturalization law"); *Gerbier v. Holmes*, 280 F.3d 297, 311 (3d Cir. 2002) (stating that "the policy favoring uniformity in the immigration context is rooted in the Constitution"); *Nemetz v. INS*, 647 F.2d 432, 435-436 (4th Cir. 1981) (noting that where homosexual sodomy was not criminalized in nine states, the "use of state law defeats the uniformity requirement").

Accordingly, this Court should hold that a noncitizen is deportable only if convicted of an offense relating to a federally controlled substance that would be prohibited under federal law.

III. THE EIGHTH CIRCUIT'S EXPANSION OF THE REALISTIC PROBABILITY TEST PLACES AN IMPOSSIBLE BURDEN ON NONCITIZENS

The categorical approach has a "long pedigree in our Nation's immigration law." *Moncrieffe*, 133 S. Ct. at 1685. Under the categorical approach, courts must examine the statutory definition of the crime to determine whether the state statute of conviction "necessarily" renders a noncitizen removable under the INA. *Id.* at 1684-85. Here, Kansas' drug paraphernalia statute expressly prohibits conduct that falls outside the scope of § 1227(a)(2)(B)(i)—the use of

drug paraphernalia in connection with at least nine substances not treated as controlled substances under the CSA. (Pet. Br. 45-46.)

Nevertheless, the Eighth Circuit held that Kansas' drug paraphernalia statute is a categorical match because there is "little more than a 'theoretical possibility' that a conviction for a controlled substance offense under Kansas law will *not* involve a controlled substance as defined in 21 U.S.C. § 802." (Pet. App. 4-5.) In support of this holding, Respondent argues that this Court's decisions in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 187 (2007), and *Moncrieffe*, 133 S. Ct. at 1685, require that individuals in removal proceedings factually prove that the government has prosecuted a "meaningful number" of cases in an overbroad manner, even where the state statute expressly covers overbroad conduct. (BIO 12.) Under Respondent's distorted version of the realistic probability test, an adjudicator must engage in substantial fact-finding and consider additional "evidence" regarding state prosecutions involving substances that state legislatures intentionally and explicitly criminalized. As Petitioner notes, Respondent's position and the Eighth Circuit's holding constitute an improper expansion of the realistic probability test, turning the categorical approach into a fact-intensive inquiry. (Pet. Br. 42-43, 49-50.) The realistic probability test was not meant to require every individual in immigration proceedings to provide evidence of actual prosecutions to establish that a state statute is categorically overbroad. (Pet. Br. 50.) Rather, the realistic probability test was meant to function as a backstop to prevent "legal imagination" from expanding the scope

of a state statute that would otherwise prove a categorical match. (Pet. Br. 44.)

The Eighth Circuit's application of the realistic probability test not only lacks legal support, but would place an impossible and unfair burden on noncitizens in immigration proceedings. Indeed, if adopted by this Court, the Eighth Circuit's expansive view of the realistic probability test would have broad negative implications in all immigration or criminal cases involving the categorical approach.

A. It is Practically Impossible to Locate the Evidence Required Under the Eighth Circuit's Expanded Realistic Probability Test

The Eighth Circuit's expansion of the realistic probability test would unfairly place an impossible burden on noncitizens in removal proceedings. This case itself demonstrates the significant practical concerns and unfair results that would be caused by the Eighth Circuit's approach.

Respondent previously argued that Kansas' drug paraphernalia statute is a categorical match because Petitioner "had not demonstrated a 'realistic probability' that a Kansas paraphernalia conviction would involve one of the handful of substances listed on the State's schedules that are not also controlled under federal law." (BIO 12.) In support of this argument, Respondent noted that "a search of Kansas cases not only reveals no such prosecutions but also reveals no mention of those substances." (BIO 12.)

Respondent was incorrect. As Petitioner demonstrated, Kansas and other states have

prosecuted individuals for offenses involving substances prohibited under Kansas law, but not the CSA. (Pet. Br. 52-55.) That this information was not readily available to either the government or Petitioner's counsel at the *certiorari* stage highlights the fundamentally unfair nature of Respondent's position. Although Kansas has prosecuted individuals for offenses involving substances that are not prohibited under the CSA, the records reflecting such prosecutions are practically impossible to find for a number of reasons.

Citable state decisions will only be available in the extremely small percentage of prosecutions that result in a trial and appeal. Therefore, a "lack of published cases or appellate-level cases does not imply a lack of convictions." *Nunez v. Holder*, 594 F.3d 1124, 1137 n.10 (9th Cir. 2010). The "majority of people who are convicted * * * never go to trial at all, but rather plead guilty to the charge." *Id.* Indeed, the Department of Justice has found that ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012). Standard legal databases on Westlaw or LexisNexis are typically limited to reported decisions from state appellate courts. But when an individual pleads guilty to a charge, there is very little chance that the case would result in a reported decision from a state court.

The lack of reported decisions is more pronounced when researching drug paraphernalia offenses. Nevada's drug paraphernalia statute provides a fitting example. In Nevada, possession of drug paraphernalia is a misdemeanor. *See* Nev. Rev. Stat. §§ 193.150,

453.566. *Amici* were, however, only able to locate a handful of reported states cases on Westlaw addressing Nevada's drug paraphernalia statute. *See, e.g.*, *Hernandez v. State*, No. 57320, 2011 WL 4378840 (Nev. Sep. 19, 2011) (unpublished); *Howe v. State*, 112 Nev. 458 (1996). Certainly, this does not mean that Nevada rarely prosecutes individuals for possession of drug paraphernalia. Rather, the lack of reported decisions attests to the likelihood that most defendants would rather plead guilty and pay a small fine than hire an attorney to contest the charges at trial or at the appellate level.

It is also practically impossible to search for specific conviction records in most states. Westlaw does not provide access to any state criminal records for twenty-five states. *See* Thomson Reuters, *Court Dockets and Court Wire Coverage*, http://legalsolutions.thomsonreuters.com/law-products/solutions/courtwire-dockets/map (last visited Sept. 23, 2014). And criminal records for the other twenty-five states are limited to a small number of specific counties. *See id.* For example, using Westlaw, it is only possible to search for criminal documents in 2 of 105 counties in Kansas and 3 of 30 counties in California. *See id.* Similarly, Lexis only provides access to state court documents in specific counties in fifteen states. *See* LexisNexis, *Support Center*, https://support.lexis-nexis.com/courtlink/record.asp?ArticleID=9439 (last visited Sept. 23, 2014).

The utility of individual state electronic docket systems is even more limited. For example, it is impossible to determine whether Kansas has prosecuted drug paraphernalia convictions in an

overbroad manner using Kansas' electronic docket system. Kansas' District Court Records Search website does not allow an individual to search for terms of phrases, such as a specific substance. *See* Kansas Office of Judicial Administration, *District Court Records Search*, https://www.kansas.gov/countyCourts/search/records?execution=e3s1 (last visited Sept. 23, 2014). Rather, Kansas' District Court Records system is limited to searching, on a county-by-county basis, for specific records using the name and birthdate of individual defendants. *See id.*

And even in states with more robust electronic docket systems, the controlled substance underlying a drug paraphernalia conviction may not be ascertainable in a search. Many states do not appear to require that the particular substance be identified to convict an individual for possession of drug paraphernalia.[17] Thus, in these states, it is unlikely that available conviction records would identify a particular controlled substance. Moreover, even in those states that require that the substance be identified, the substance may not be identified on the criminal docket. (*See* Pet. Br. 52.)

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[17] For example, although limited criminal records are available for some counties in Florida, Illinois, Maryland, Michigan, and Pennsylvania, the jury instructions indicate that a particular substance may not be identified in a paraphernalia prosecution in those jurisdictions. *Compare* Fla. Standard Crim. Jury Instr. § 25.14; Ill. Pattern Jury Instr., Crim. §§ 17.65, 17.66; Md. Crim. Pattern Jury Instr. § 4:24.4; Mich. Crim. Non-Standard Jury Instr. § 11:7; Pa. Suggested Standard Crim. Jury Instr. § 16.13(a)(32)) *with* Thomson Reuters, *Court Dockets and Court Wire Coverage*, http://legalsolutions.thomsonreuters.com/law-products/solutions/courtwire-dockets/map (last visited Sept. 23, 2014).

In drug paraphernalia cases, there is no practical way to obtain the evidence necessary to satisfy Respondent's expansion of the realistic probability test. It would therefore be fundamentally unfair to rely on the lack of such evidence as the basis to deport a legal permanent resident or deny noncitizens other critical immigration relief.

B. Noncitizens Would Face Insurmountable Hurdles Satisfying the Eighth Circuit's Expanded Realistic Probability Test

Satisfying the requirements of the Eighth Circuit's realistic probability test would be incredibly difficult for anyone to accomplish. As discussed above, even with unlimited time and resources, the odds of locating the required conviction records are extremely low. Noncitizens subject to removal proceedings, however, are particularly ill-suited to meet this burden for several reasons.

First, individuals in removal proceedings under § 1227(a)(2)(B)(i) are subject to mandatory detention. 8 U.S.C. § 1226(c)(1)(B); *see also Demore v. Kim*, 538 U.S. 510 (2003) (upholding mandatory detention during removal proceedings where noncitizen conceded removability). In 2012, Immigration and Customs Enforcement detained an "all-time high" of 477,523 noncitizens. U.S. Dep't of Homeland Security, Office of Immigration, Statistics, *Immigration Enforcement Actions: 2012*, 5 (2013), http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2012_1.pdf. And in 2013, thirty-seven percent of all completed immigration cases (63,313 out of 173,018 cases) involved detained noncitizens. *See Executive Office for*

Immigration Review, FY 2013 Statistics Yearbook, G1 (2014), http://www.justice.gov/eoir/statspub/fy13syb.pdf. But detention is only the first of many hurdles a nonimmigrant faces in satisfying the Eighth Circuit's realistic probability test.

Second, the vast majority—eighty-three percent—of detainees are unrepresented by counsel. *See* Building an Immigration System Worthy of American Values, *Testimony of the American Immigration Lawyers Association submitted to the Committee on the Judiciary of the U.S. Senate*, hearing on March 20, 2013 (2013), http://www.aila.org/content/default.aspx?bc=6755%7C12178%7C48664%7C43741. Noncitizens in immigration proceedings have no right to be appointed counsel. 8 U.S.C. § 1362; *Matter of Gutierrez*, 16 I. & N. Dec. 226, 228-29 (B.I.A. 1977) (holding that the government will not appoint counsel, regardless of the circumstances). And detainees typically cannot afford counsel or are shuffled through the system before they find an advocate. *See* Capps, Fix, Passel, & Perez-Lopez, *A Profile of the Low-Wage Immigrant Workforce*, http://www.urban.org/publications/310880.html (last visited Sept. 23, 2014) (reporting that nearly half of immigrants earn less than two-hundred percent of the minimum wage). In total, 560,499 noncitizens whose removal proceedings were completed between 2008 and 2013 were unrepresented. *See Executive Office for Immigration Review, FY 2013 Statistics Yearbook*, F1, Figure 10 (2014), http://www.justice.gov/eoir/statspub/fy13syb.pdf. It is therefore highly unlikely that noncitizens will have any legal assistance locating the required state conviction records.

Third, detained noncitizens proceeding *pro se* will rarely (if ever) have the resources needed to obtain conviction records satisfying the realistic probability test. Most notably, detainees' access to legal materials is significantly limited. *See 2011 Operations Manual ICE Performance-Based National Detention Standards* (hereinafter "PBNDS"), Part 6, Appendix 6.3A (List of Legal Reference Materials for Detention Facilities), 410-13, (as modified by February 2013 Errata), http://www.ice.gov/doclib/detention-standards/2011/law_libraries_and_legal_material.pdf. For example, detention facilities' law libraries apparently lack any state-specific legal materials.[18] *See id.* And detainees do not appear to have access to email or the internet, let alone online legal databases. *Id.* Furthermore, detainees have limited access to telephone or facsimile communications. *See* PBNDS, Part 5.6 (Telephone Access), 362-363, (as modified by February 2013 Errata), https://www.ice.gov/doclib/detention-standards/2011/telephone_access.pdf; *PBNDS*, Part 5.1 (Correspondence and Other Mail), 334, (as modified by February 2013 Errata), http://www.ice.gov/doclib/detention-standards/2011/correspondence_and_other_mail.pdf. These substantial limitations make it practically impossible for noncitizens to even attempt to compile the evidence necessary to satisfy the Eighth Circuit's expanded realistic probability test.

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[18] Even if a detention center law library has state-specific legal materials, there is no guarantee that it would have legal materials for the state in which a detained noncitizen was actually convicted because, for instance, there are not detention centers in every state. *See* ICE, *Facility Locator*, http://www.ice.gov/detention-facilities/ (last visited Sept. 23, 2014).

Fourth, language barriers and limited education further exacerbate the difficulties noncitizens would face under the Eighth Circuit's ruling. Approximately eighty-one percent of noncitizens in removal proceedings are not fluent in English. *See Executive Office for Immigration Review, FY 2013 Statistics Yearbook*, E-1, Figure 9 (2014), http://www.justice.gov/eoir/statspub/fy13syb.pdf. Nearly half of noncitizens have not completed high school, and many others have completed no schooling at all. *See Educational Attainment in the United States: 2009*, 2 (Feb. 2012), http://www.census.gov/prod/2012pubs/p20-566.pdf (reflecting a forty-eight percent rate of high school completion among foreign-born Hispanics); Elizabeth Grieco, *Educational Attainment of the Foreign Born in the United States* (July 2004), http://www.migration information.org/feature/display.cfm?ID=234 (finding that 1.4 million foreign born individuals over the age of twenty-four completed no schooling). Even if they could locate (currently nonexistent) court records which could satisfy the realistic probability test, noncitizens with limited English fluency and limited education may not be able to recognize the value of what they located.

Finally, noncitizens are unlikely to have sufficient time to compile the evidence necessary to satisfy the reasonable probability test. The Executive Office for Immigration Review ("EOIR") has case completion goals designed to expedite detainee cases (other than those involving asylum claims). For example, in 2013, seventy-three percent of detainee cases were completed within sixty days, and ninety-seven percent of detainee appeals were completed by the BIA within one-hundred and fifty days. *See* Department of Justice, *FY 2013 Annual Performance Report & FY 2015 Annual*

Performance Plan, II-51-II-53 (March 2014), http://www.justice.gov/sites/default/files/ag/legacy/2014/05/14/apr2013-app2015.pdf. Continuance requests are also often denied. *See, e.g.*, *Dent v. Holder*, 627 F.3d 365 (9th Cir. 2010) (evaluating IJ's denial of a motion for continuance because petitioner was unable to gather factual evidence quickly enough for the immigration judge's review); *Badwan v. Gonzales*, 494 F.3d 566, 569-570 (6th Cir. 2007) (evaluating IJ's denial of a motion for continuance and statement that "we're under severe constraints in terms of making certain that cases are handled in an expeditious manner"). Thus, lack of time is another essentially insurmountable obstacle noncitizens face in obtaining the evidence necessary to satisfy the realistic probability test.

Congress requires that a noncitizen be afforded a "reasonable opportunity * * * to present evidence on [her] own behalf." 8 U.S.C. § 1229a(b)(4)(B). There is nothing reasonable about requiring a noncitizen to prove that states have applied drug paraphernalia statutes to controlled substances that are not prohibited under the CSA. Rather, this places an impossible burden on those individuals least capable of meeting it.

C. The Eighth Circuit's Fact-Intensive Approach Would Overburden the Immigration System and Lead to Inconsistent Results

The categorical approach requires a straightforward, purely legal analysis of a noncitizen's prior state conviction. In contrast, the Eighth Circuit's rule would burden the immigration system by calling

for Immigration Judges ("IJs") to conduct complicated, fact-intensive inquiries.

IJs have an affirmative duty to develop the record, particularly in *pro se* cases. *See* 8 U.S.C. § 1229a(b)(1) ("The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses."); *Richardson v. Perales*, 402 U.S. 389, 410 (1971) (an administrative law judge "acts as an examiner charged with developing the facts"); Charles H. Koch, Jr., *Administrative Law and Practice* § 5.25 (2d ed.1997) ("an administrative judge has a well-established affirmative duty to develop the record."). Under the Eighth Circuit's rule, IJs will first need to determine the degree of overlap, if any, between a state's controlled substances statute and the federal CSA. IJs will then need to determine whether the particular substance at issue has been prosecuted in a "meaningful number" of cases, if at all. But IJs presiding over removal proceedings have extremely limited resources. Immigration courts suffer from substantial backlogs,[19] and IJs' caseloads are triple that of federal district court judges.[20] IJs do not even

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[19] As of August 2014, there were 408,037 pending immigration cases. *See* TRACImmigration, *Immigration Court Backlog Tool*, http://trac.syr.edu/phptools/immigration/court_backlog/ (Last visited Sept. 22, 2014). And in 2013, immigration courts received over 270,000 new matters and completed over 250,000 proceedings. *See* Executive Office for Immigration Review, *FY 2013 Statistics Yearbook*, A2, Figure 1 (2014), http://www.justice.gov/eoir/statspub/fy13syb.pdf.

[20] IJs each hear up to 1,500 cases per year, whereas federal judges typically hear only 440. *See* Eli Saslow, *In a crowded immigration*

have their own law clerks—on average four IJs share one law clerk.[21] Yet the Eighth Circuit and Respondent would call upon overburdened IJs to comb through unpublished state decisions or conviction records (when available) to confirm that states actually prosecute the crimes that are on their books. The consequences of this scheme would, of course, be disproportionately felt by the *pro se* detainees whose cases are delayed or denied because evidence is either not available or not located in time.

The Eighth Circuit's expanded realistic probability test also invites inconsistent results. For example, two noncitizens convicted of the same offense in the same jurisdiction would be treated very differently. One noncitizen's administrative record may include "factual" evidence about other prosecutions in that jurisdiction, while the other's—because she appeared *pro se* and the presiding IJ's shared law clerk failed to adequately supplement her research efforts—does not. This fact-intensive inquiry can hardly be called a categorical approach. And without the categorical approach, dramatically different immigration outcomes

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court, seven minutes to decide a family's future, Washington Post, February 2, 2014, http://www.washingtonpost.com/national/in-a-crowded-immigration-court-seven-minutes-to-decide-a-familys-future/2014/02/02/518c3e3e-8798-11e3-a5bd-844629433ba3_story.html.

[21] *See generally* Testimony of Dana Leigh Marks, Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law of the House Committee on the Judiciary on Oversight Hearing on the Executive Office For Immigration Review, at 2 (June 17, 2010), http://judiciary.house.gov/_files/hearings/pdf/Marks100617.pdf.

for people convicted of the same criminal offense are inevitable. That cannot have been Congress' intent.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Eighth Circuit. First, to ensure the fair and uniform application of the immigration laws, this Court should hold that § 1227(a)(2)(B)(i) only applies to convictions involving federally controlled substances and conduct that is actually prohibited under federal law. Second, the Court should reject the Eighth Circuit's improper application of the "realistic probability" test, which would place an impossible burden on noncitizens in removal proceedings.

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